92-575

No. 92-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

EARLE A. PARTINGTON and JEFFREY J. LAU,

Petitioners,

v.

HERMAN T.F. LUM, EDWARD H. NAKAMURA, FRANK D. PADGETT, YOSHIMI HAYASHI, JAMES H. WAKATSUKI, JEREMY T. HARRISON, CHARLENE M. NORRIS, JOSEPH M. GEDAN, HOWARD T. CHANG, and MARK J. BENNETT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EARLE A. PARTINGTON
(Counsel of Record)
PARTINGTON & FOLEY
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 526-9500
Petitioner Pro Se and Counsel for Petitioner Lau

KAREN A. ESSENE
2133 Alaeloa Place
Honolulu, Hawaii 96821
Telephone: (808) 732-2192
Counsel for Petitioner Partington

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is the attorney-client privilege part of the Sixth Amendment right-to-counsel clause, and, if so, may a state force a criminal defense attorney to breach the privilege in a public attorney disciplinary proceeding over the client's objections and without the client's waiver on the promise that the client's "remedy" is to bar the state from using against him the confidences and secrets revealed in any proceeding?

2. Is a criminal defense attorney's right to due process violated when, in the absence of any prescribed procedure, a court imposes a monetary sanction upon the attorney without notice or opportunity to be heard and then denies the attorney's after-the-fact motion requesting an opportunity to be heard?

3. Is a civil rights complaint brought by a criminal defense attorney and one of his clients sufficient to defeat a motion to dismiss on the pleadings where the complaint alleges, or could be amended to allege, claims

   a. for damages against state judicial officials, in their capacity as party defendants in a civil rights action in federal court, for their deliberate or reckless misrepresentations to the federal courts, made for the purpose of defrauding the federal courts into granting and then maintaining judgments in their favor, or

   b. for declaratory and injunctive relief where state officials are engaged in a continuing course of conduct of harassment, intimidation, and retaliation against the attorney for exercising his federal constitutional rights arising out of his defense of criminal clients?

PARTIES TO THE PROCEEDING

The petitioners in this case are:

EARLE A. PARTINGTON, a criminal defense attorney

JEFFREY J. LAU, a representative client of Partington

The respondents in this case are:

HERMAN T.F. LUM, Chief Justice, Supreme Court of Hawaii

EDWARD H. NAKAMURA, Associate Justice, Supreme Court of Hawaii (retired March 23, 1990)

FRANK D. PADGETT, Associate Justice, Supreme Court of Hawaii (retired March 29, 1992)

YOSHIMI HAYASHI, Associate Justice, Supreme Court of Hawaii (retired March 29, 1992)

JAMES H. WAKATSUKI, Associate Justice, Supreme Court of Hawaii (deceased September 22, 1992)

JEREMY T. HARRISON, Dean of the William S. Richardson School of Law, University of Hawaii

CHARLENE M. NORRIS, Assistant Disciplinary Counsel of the Office of Disciplinary Counsel of the Supreme Court of Hawaii

JOSEPH M. GEDAN, the special master in the special attorney disciplinary proceeding brought against Partington pursuant to Hawaii Supreme Court Rule 13

PARTIES TO THE PROCEEDING – Continued

HOWARD T. CHANG, the first special prosecutor in the special attorney disciplinary proceeding brought against Partington pursuant to Hawaii Supreme Court Rule 13 (Chang resigned in 1990)

MARK J. BENNETT, the successive special prosecutor in the special attorney disciplinary proceeding brought against Partington pursuant to Hawaii Supreme Court Rule 13 (Bennett having been appointed in 1990 to replace Chang)

The following associations moved for leave to appear as amici curiae and submitted amicus briefs, but the court of appeals failed to rule on their motions:

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

THE AMERICAN CIVIL LIBERTIES UNION OF HAWAII

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on April 14, 1992, and amended on July 2, 1992.

OPINIONS BELOW

The opinion of the district court in *Partington v. Gedan*, entered on July 3, 1990 (*see* 36a-38a), is unreported, as is its opinion in *Lau v. Lum*, entered on December 17, 1990 (*see* 39a-58a). The two cases were consolidated on appeal, and the appellate decision is reported as *Partington v. Gedan*, 961 F.2d 852 (9th Cir. 1992) ("*Partington IV*") (*see* 1a-35a). Also of note is the earlier Ninth Circuit opinion reported as *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3302 (1990) ("*Partington I*") (*see* 59a-141a).

JURISDICTION

The final judgment of the court of appeals was entered on July 2, 1992, the same date that the petition for rehearing was denied and the suggestion for rehearing en banc rejected. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

United States Constitution, Amendment XIV:

[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . .

42 U.S.C. § 1983:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Hawaii Supreme Court Rule 2: *see* 142a-176a.

Hawaii Supreme Court Rule 13: *see* 177a-179a.

STATEMENT OF THE CASE

In 1984 Petitioner Partington was appointed to represent the defendant in *State v. Clarke* in the Circuit Court of the First Circuit, State of Hawaii; Clarke was charged with first degree murder for the brutal, and eventually fatal, abuse of his girlfriend's three-year-old daughter. *Partington I*, 880 F.2d at 117; 61a. Clarke was convicted as charged; on appeal to the Supreme Court of Hawaii,

Clarke raised numerous issues, none of which has ever been addressed by the Supreme Court of Hawaii. 880 F.2d at 118; 61a. Instead, in its memorandum opinion in *State v. Clarke*, No. 10041 (Haw. Dec. 27, 1985), the supreme court reversed Clarke's conviction on the ground, raised *sua sponte* by the court, that Clarke had been denied effective assistance of counsel through the misconduct of Partington; Clarke had not then, nor since, accused Partington of rendering ineffective assistance, and the court's final adjudication came without notice to Partington or opportunity to be heard. *Partington I*, 880 F.2d at 117-18; 61a-62a; *Partington IV*, 961 F.2d at 855; 5a-6a. As a matter of law, the record in *State v. Clarke* did not establish that Partington had rendered ineffective assistance of counsel to Clarke (Record in *Lau v. Lum*, DC No. CV-89-0400-ACK, 9th Cir. No. 91-15194 (hereinafter "R(*Lau*) 98, Ex. F at 29-50).

The final adjudication of ineffectiveness automatically triggered the initiation of a special attorney-disciplinary proceeding against Partington, pursuant to Hawaii Supreme Court Rule (HSCR) 13 (*reprinted at* 177a-179a). The HSCR 13 proceeding languished until 1987 when Partington filed a federal suit against the HSCR 13 special master and special prosecutor in *Partington v. Gedan*, alleging violations of his First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights. *Partington I*, 880 F.2d at 119; 66a-67a. The HSCR 13 special master and special prosecutor moved to dismiss on the ground of *Younger* abstention.[1] *Id.* at 120; 67a. The district

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[1] *See Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

court granted the motion to dismiss; in a divided opinion, the court of appeals affirmed. *Partington I*, 880 F.2d 116; 59a-141a.

In due course, the HSCR 13 proceeding went forward in 1990. Neither Partington nor Clarke testified, and no new evidence was presented, thus leaving the special master with an identical record to that which was before the Supreme Court of Hawaii in 1985. Undaunted, the special master employed a presumption of *in*effectiveness, stating: "Partington's refusal to offer any evidence or defense or explanation for his behavior had made the Special Master's conclusions [finding Partington guilty of misconduct] inevitable." R(*Lau*) 98, Ex. D at 31. Upon review in fall 1990, the state supreme court held that the special master had exceeded his authority in that the issue of Partington's misconduct had already been finally adjudicated by the supreme court itself; but nonetheless, the supreme court threw out the special master's recommendations (for action to be taken against Partington) and dismissed the proceeding with prejudice. R(*Lau*) 98, Ex. A1.

During and after the HSCR 13 proceeding, respondent Norris of the Office of Disciplinary Counsel ("ODC") corresponded with Partington and demanded that Partington explain his trial tactics in *State v. Clarke*, which explanation would have required him to reveal Clarke's confidences and secrets. *Partington IV*, 961 F.2d at 857; 10a. Partington refused to breach the attorney-client privilege, and in 1991 Norris instituted a formal attorney disciplinary proceeding against Partington (*id.* at 857; 9a), pursuant to HSCR 2 (*see* 142a-176a).

Earlier (in 1989), Partington and one of his clients (petitioner Lau) had filed a federal suit entitled *Lau v. Lum*[2] (*see* R (*Lau*) 1), seeking redress for the imposition of a fifty-dollar sanction against Partington when he moved to withdraw as court-appointed counsel in *State v. Lau*. *Id.*, Ex. D. The sanction was imposed by one of the respondent-justices without notice, an order to show cause, or a hearing. *Id.*, Exs. D-E. Partington moved to vacate the sanction or for en banc review and an evidentiary hearing; in his moving papers, Partington sought an opportunity to put evidence before the court that he had been singled out for unfair and unprecedented treatment, in violation of equal protection of the law. *Id.*, Ex. F. Partington did not specify an oral hearing or any other particular form of hearing. The supreme court denied Partington any opportunity to be heard. *Id.*, Ex. G. In fact, Partington had violated no rule, as the uncontradicted evidence in *Lau v. Lum* later showed (*see* R(*Lau*) 75, 88, 89, 91).

Under protest, Partington paid $50.00 into the Dean's Discretionary Fund, under the control of respondent Harrison, Dean of the University of Hawaii School of Law. *Partington IV*, 961 F.2d at 857; 9a. As respondents-justices and Harrison well knew, the fund is privately owned and is not state money; the only role the law school dean has with respect to the fund is to control expenditures from it. 182a-184a.

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[2] The district court's jurisdiction in *Lau v. Lum* and *Partington v. Gedan* lay under 28 U.S.C. § 1343(a)(3).

In 1990, the proposed third amended complaint in *Lau v. Lum*, which augmented the second amended complaint, alleged that the justices of the Supreme Court of Hawaii and their agents, who are respondents here (Chang being the only respondent not named in *Lau v. Lum*), had engaged in a course of conduct in violation of Partington's constitutional rights. The chief elements of respondents' course of conduct were: (a) depriving Partington of due process; (b) falsely accusing him in two cases (*State v. Clarke* as well as another case) of misconduct by deliberate ineffectiveness; (c) wrongfully entering the *sua sponte* final adjudication of misconduct in *State v. Clarke;* (d) forcing Partington to endure a public disciplinary proceeding – the entirely specious and unconstitutional HSCR 13 proceeding; (e) falsely representing to the federal courts that the supreme court's adjudication of misconduct against Partington was not final; (f) refusal by the justices to rule on Partington's prehearing challenges in the HSCR 13 proceeding; (g) refusal by the justices to recuse themselves, thereby preventing substitute justices from ruling Partington's challenges; (h) allowing a second specious investigation against Partington (under HSCR 2) to continue when it, too, is premised on the 1985 *sua sponte* adjudication against Partington; (i) imposing a monetary sanction against Partington in *State v. Lau* for nonsanctionable conduct; and (j) knowingly or recklessly misrepresenting to the district court the facts and Hawaii law in the matter of the fifty-dollar sanction in *State v. Lau.* R(*Lau*) 32 & 107, Ex. A.

As amended, the complaint alleged but one course of conduct by the justices and their agents, directed at

Partington in deprivation of Partington's and Lau's constitutional rights. The prayer of the complaint, however, requested multiple forms of declaratory and injunctive relief.[3] In the proposed third amended complaint, Partington requested damages for respondents' fraud upon the federal courts (items 1-6, *infra*). From 1987 through the present, in order to obtain and maintain judgments in the instant cases, respondents' course of conduct has included a series of false representations to both the district court and the court of appeals, as follows:

1. *Misrepresentation:* A certain letter written in 1987 by two of the respondent-justices ("the 1987 letter") was a judicial interpretation by the supreme court that Partington had not been finally adjudicated in 1985 to have rendered ineffective assistance in *State v. Clarke*.[4] *Truth:* The 1987 letter was not a judicial interpretation because the 1985 adjudication was final that Partington had rendered ineffective assistance. R(*Lau*) 98, Ex. A1 & A2.

2. *Misrepresentation:* The 1987 letter was a judicial interpretation by the supreme court

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[3] In *Partington v. Gedan*, Partington had sought relief from judgment, pursuant to Fed. R. Civ. P. 60(b). The primary basis for the 60(b) motion was *Matsuo v. State*, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989), holding, in effect, that a *sua sponte* adjudication of ineffectiveness is not permitted because it would be "unfair" to the attorney. The district court denied relief (36a-38a).

[4] Record in *Partington v. Gedan*, DC No. CV-87-0172-ACK, 9th Cir. No. 90-15942 (hereinafter "R(*PvG*) 10, Exh. A; R(*PVG*) 10, memo at 4; R(*PvG*) 15 at 12; Ans. Brief in *Partington I*, at 16, 28; R (*Lau*) 18 at 3, 5, 8, 9, 10, 13, 14, 15, 16-17.

that HSCR 13 affords de novo review of the finding of ineffective assistance.[5] *Truth:* The first time HSCR 13 was construed by the Supreme Court of Hawaii, it was held that de novo review is not permitted. R(*Lau*) 98, Exs. A1 & A2.

3. *Misrepresentation:* The specific HSCR 13 proceeding against Partington would afford him do novo review of the finding of ineffectiveness.[6] *Truth:* The 1985 adjudication of ineffectiveness was res judicata and could not be relitigated in the HSCR 13 proceeding. R(*Lau*) 98, Exs. A1 & A2. (This particular fraudulent misrepresentation was decisive in the obtaining of the abstention order in *Partington I*. *See* 880 F.2d at 126; 82a-83a.)

4. *Misrepresentation:* The supreme court would afford interlocutory review of *any* constitutional claims by Partington in the HSCR 13 proceeding.[7] *Truth:* When Partington sought such interlocutory review, the supreme court denied all relief. R(*PvG*) 28, Ex. I.

5. *Misrepresentation:* The HSCR 13 proceeding against Partington was in the nature of an

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[5] *See* preceding note and immediately following note.

[6] Ans. Brief in *Partington I*, at 27-28; R(*Lau*) 18 at 22; R(*PvG*) 36 at 7; Memo in *Lau v. Lum*, 9th Cir. No. 90-15651 (May 17, 1990), at 28-29.

[7] Ans. Brief in *Partington I*, at 8. In January 1990, the respondent-justices in their party capacity in federal court in *Lau v. Lum* ratified the misrepresentations made in *PvG*. *See* R(*Lau*) 18, at 3, 5, 8, 9, 10, 13, 14, 15, 16-17.

ordinary attorney *disciplinary* proceeding.[8] *Truth:* HSCR 13 proceedings are not disciplinary proceedings at all; in fact, they are remedial in nature. R(*Lau*) 98, Exs. A1 & A2. (This particular fraudulent misrepresentation was critical to the holding in *Partington I* that *Middlesex* mandated abstention. 880 F.2d at 122; 73a.)

6. *Misrepresentation:* Partington violated a court rule (Haw. R. App. P. 11(a)) in *State v. Lau* by failing to move to extend time to docket the record.[9] *Truth:* The Court rule in question did not require the filing of such a motion, and by custom and practice such a motion was and is optional. R(*Lau*) 75, 88, 89, 91.

7. *Misrepresentation:* The Dean's Discretionary fund, into which Partington paid the fifty-dollar sanction in *State v. Lau,* is part of the state treasury.[10] *Truth:* The fund is owned by a private, not-for-profit 501(c)(3) organization with no legal ties to the University of Hawaii or to any other public entity. 182a-184a. (This particular fraudulent misrepresentation was accepted as true by the court of appeals and was the *sine qua non* for its alternative holding in *Partington IV* that the Eleventh Amendment bars Partington's claim to recover the fifty-dollar sanction. 961 F.2d at 865; 30a-31a.)

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[8] Ans. Brief in *Partington I,* at 1, 2, 4, 19, 24, 44.

[9] R(*Lau*) 9, Memo at 5, 6, 30-31, 42, 44-45.

[10] R(*Lau*) 33 at 10 para. 33; R(*Lau*) 45, Memo at 15; Ans. Brief in *Lau v. Lum* at 38-39.

The district court dismissed the complaint in *Lau v. Lum* on the pleadings (39a-58a), and the court of appeals affirmed (1a-35a). The primary holdings of the court of appeals were as follows: that Partington may breach the attorney-client privilege without violating the Sixth Amendment in order to defend himself in an attorney disciplinary proceeding, whether or not his former client Clarke has waived the privilege (961 F.2d at 863-64; 25a-27a); that Partington was not denied due process of law when he was sanctioned without notice or a hearing because his request for a hearing was the equivalent of a hearing (961 F.2d at 865; 28a-30a); that, in the alternative, Partington was barred by the Eleventh Amendment from recovering the fifty-dollar sanction because the money was paid into a state fund (961 F.2d at 865; 30a-31a), notwithstanding that during the motion for rehearing Partington presented compelling evidence that the fund was privately owned (180a-184a; Appellants' Addendum to the Petition for Rehearing, etc. (dated June 17, 1992)); that Partington's claim for damages against state judicial officials was barred by absolute immunity (961 F.2d at 866-67; 32a-34a), notwithstanding that the damage claim was based solely upon fraud upon the federal court in their capacity as party defendants in a civil rights action (R(*Lau*) 107, Ex. A); and that Partington's claim for relief from an ongoing course of harassing conduct was barred in its entirety by *Younger* because part of it was barred by *Younger* (961 F.2d 861-62; 20a-21a).

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to decide whether the attorney-client privilege is part of the Sixth Amendment right-to-counsel clause, and, if so, whether a state can force a criminal defense attorney to breach the privilege in a public attorney disciplinary proceeding over the client's objection and without the client's waiver on the premise that the client's "remedy" is to bar the state from using against him the confidences and secrets revealed in any proceeding.

The instant case presents the important issue of whether a state can force a criminal defense attorney to reveal his client's confidences and secrets where someone other than the client has accused the attorney of having rendered ineffective assistance to the client, and where the client has not made such an accusation and has never knowingly, intelligently, and voluntarily waived the attorney-client privilege. Partington has steadfastly refused to breach the privilege, but the state is conducting an attorney disciplinary proceeding against Partington in which the only way he can defend himself is to breach the privilege. The state's proceeding is predicated solely upon the Supreme Court of Hawaii's 1985 *sua sponte* adjudication of ineffectiveness, an adjudication without basis in law in the state appellate record.

The court of appeals held that "[a] violation of the attorney-client privilege implicates the Sixth Amendment right to counsel only . . . when the government interferes with the relationship between a criminal defendant and his attorney" and only during criminal proceedings, not after the termination of such proceedings, and then only

if "government interference with the privilege . . . substantially prejudice[s] the criminal defendant." *Partington IV*, 961 F.2d at 863; 25a-26a. The court's authority for the substantial prejudice requirement was *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977).

To the contrary, *Weatherford* did not set out a substantial prejudice test for determining whether government interference with the attorney-client privilege violates the Sixth Amendment. In fact, *Weatherford* did not even involve a breach of the privilege. Whether a communication is privileged is in no way dependent on whether revelation of the communication would prejudice the criminal defendant.

> [The privilege applies] (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) are made in confidence (5) by the client (6) are at the client's instance permanently protected (7) from disclosure (8) except if the protection be waived.

8 Wigmore, Evidence § 2292 (McNaughton rev. 1961). Prejudice forms no part of the test for the obvious reason that it would be necessary first to breach the privilege in order to determine if the client would be prejudiced. In fact, the very act of breaching the privilege may substantially prejudice the client. Therefore, if the attorney-client privilege is a privilege against disclosure, then a prejudice test is an impossibility.

By creating a prejudice test, the court of appeals below reduced the attorney-client privilege to a component of the Fifth Amendment privilege against self-incrimination. To the court of appeals, protecting the

client from having privileged communications used against him is all that the attorney-client privilege and the Sixth Amendment require (26a). Thus, so long as forcing Partington to reveal Clarke's secrets does not incriminate Clarke, the court of appeals would find no constitutional violation, notwithstanding that the confidences and secrets sought to be revealed go to the heart of the right-to-counsel clause – the right to freely discuss and decide strategy and tactics employed on behalf of Clarke at his criminal trial.

The purpose of the attorney-client privilege, as this Court has explained it, is wholly unrelated to the privilege against self-incrimination: "the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients." *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 348 (1985). Attorneys are not at liberty to disclose confidential communications, even if they wish to do so. *Alexander v. United States,* 138 U.S. 353, 358 (1891); *Chirac v. Reinicker,* 24 U.S. (11 Wheat.) 280, 294 (1826); *Colton v. United States,* 306 F.2d 633, 636 (2d Cir. 1962).

Serious questions arise as to whether the holding of the court of appeals defeats the purpose of the attorney-client privilege. Will a client fully and frankly communicate with the attorney when the client knows that at the close of the criminal case the state is free to force the attorney to disclose the client's confidences, despite objections by the client and despite the fact that the client is satisfied with counsel's assistance? Who will provide truly effective assistance of counsel, rather than assistance that merely appears effective, if the state is free to bring an attorney disciplinary proceeding premised

solely on an unfounded accusation of having rendered ineffective assistance, the accusation being made by a state official who is not privy to the essential facts of the case and who has no evidence of unethical conduct or other wrongdoing? Who will provide assistance of counsel to criminal defendants if the state is free to conduct fishing expeditions into counsel's choice of trial strategy?

Questions such as these are too important to go unanswered. The opinion of the court of appeals eviscerates the attorney-client privilege arising out of criminal cases and should, therefore, be reviewed by this Court.

II. Certiorari should be granted to decide whether a criminal defense attorney's right to due process is violated when, in the absence of any prescribed procedure, a court imposes a monetary sanction upon the attorney without notice or opportunity to be heard and then denies the attorney's after-the-fact motion requesting an opportunity to be heard.

The instant case presents the important question of whether a criminal defense attorney's right to due process is violated when a court imposes a monetary sanction upon the attorney without notice or hearing and then denies the attorney's after-the-fact motion for some kind of hearing to offer evidence showing the sanction was unjustified. The fifty-dollar sanction imposed in a criminal appeal on Partington by one of the justices of the Supreme Court of Hawaii occurred without notice or issuance of an order to show cause and without any prior hearing. There is no prescribed procedure in Hawaii statutes, court rules, or case law governing the imposition of sanctions by state appellate courts. When Partington

moved after the fact to vacate the sanction as unjustified or for a hearing in some form to offer evidence establishing the lack of any basis for the sanction, the chief justice denied the motion, and the state court never heard Partington's evidence.

The court of appeals held that, because Partington had explained the basis of his motion in a memorandum of points and authorities and as the chief justice had given "plenary consideration" to his motion, there was no "inability to be heard" that justified a departure from *Rooker-Feldman*, notwithstanding that the state court never actually heard Partington's evidence. *Partington IV*, 951 F.2d at 865; 30a. Thus the court of appeals equated the *request* for an opportunity to be heard with the *opportunity* itself. In fact, the first time Partington learned that his request was his "opportunity," was when the federal courts so ruled.

As this Court has held, the Due Process Clause provides a guarantee of "fair procedure," *Zinermon v. Burch*, 110 S. Ct. 975, 983 (1990), and "requires '*some* kind of notice and . . . *some* kind of hearing.' " *Id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (emphasis in original)). This Court has never suggested, much less held, that the opportunity to request a hearing is the equivalent of the opportunity to be heard required by minimum due process. This Court should review the holding of the court of appeals on this issue.

III. Certiorari should be granted to decide whether a civil rights complaint brought by a criminal defense attorney and one of his clients is sufficient to defeat a motion to dismiss on the pleadings where the complaint alleges, or could be amended to allege, claims

A. for damages against state judicial officials, in their capacity as party defendants in a civil rights action in federal court, for their deliberate or reckless misrepresentations to the federal courts, made for the purpose of defrauding the federal courts into granting and then maintaining judgments in their favor, or

B. for declaratory and injunctive relief where state officials are engaged in a continuing course of conduct of harassment, intimidation, and retaliation against the attorney for exercising his federal constitutional rights arising out of his defense of criminal clients.

The instant case presents the important question of whether a criminal defense attorney can plead a claim for relief against the justices of a state supreme court and their agents under § 1983 predicated on a continuing course of conduct of harassment, intimidation, and retaliation against the attorney, where the conduct includes fraudulent misrepresentations to the federal courts in order to prevent federal intervention to protect the attorney's constitutional rights. In the proposed third amended complaint in *Lau v. Lum*, Partington sought damages from the HSCR 13 special master and two of the justices of the Supreme Court of Hawaii for their misrepresentations to the federal courts, *made in their capacity as*

party defendants, for the purpose of defrauding the federal courts into granting and then maintaining judgments in their favor in *Partington I* and *IV*. (Seven of those misrepresentations are set out *supra*.)

That respondents, or some of them, are lying to the federal courts is no better illustrated than in their repeated claim that the fund into which Partington paid the fifty-dollar sanction is a state fund (the seventh misrepresentation). During the pendency of the petition for rehearing, Partington discovered the identity of the owner of the fund as a particular private foundation (180a-184a), and he informed the court of appeals, thereby exposing yet another fraud by respondents. *See* Appellants' Addendum to the Petition for Rehearing, etc., filed in the court of appeals (dated June 17, 1992). Respondents did not respond to the exposure of their fraud, and the fraud succeeded. The court of appeals refused to delete its holding (alternative to the bar of *Rooker-Feldman*) that Partington's claim for the return of the fifty dollars is barred by the Eleventh Amendment. *See Partington IV*, 961 F.2d at 865; 30a-31a.

The court of appeals held that the justices and the special master were absolutely immune from suit for writing the 1987 letter (to several members of the criminal defense bar) and thus for any misrepresentations related to the letter, no matter how tenuous that relationship.[11] *Partington IV*, 961 F.2d at 866-67; 32a-34a. The

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[11] Contrary to the assertion of the court of appeals, Partington never claimed damages for the *writing* of the letter. Rather, he claims damages for the justices' and the special master's *misrepresentations to the federal courts* that the substance of

court of appeals failed to distinguish the justices' capacity in writing the letter from their capacity in making misrepresentations to the federal courts relating to the substance of the letter. This Court has said:

> [A] judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity and that "whether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function formally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."

Mireles v. Waco, 112 S. Ct. 286, 288 (1991) (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). The holding of the court of appeals not only stands in direct conflict with *Mireles* and *Stump*, but, for state judicial officials who are sued in federal court, it creates a license to lie to the court, provided only that the basis for the lawsuit is related, even tenuously, to action taken in their state judicial capacity.

In regard to the allegation of a continuing course of conduct of harassment, intimidation, and retaliation against Partington, the court of appeals held that, because the course of conduct was "based in part" upon a pending state proceeding, the *Younger* doctrine precluded declaratory and injunctive relief as to the entire course of conduct. *Partington IV*, 961 F.2d at 861; 20a-21a. No authority was cited for the proposition that *Younger*

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the letter was true when the justices well knew, and the special master knew or should have known, that the letter was false in material part.

abstention bars all relief where only a small fraction of the conduct in question may be subject to *Younger,* no matter how egregious the greater part of the conduct may be. Nor was it explained why the complaint could not be amended to delete those few allegations within the scope of *Younger.* The holding of the court of appeals grants state officials license to violate civil rights by a harassing course of conduct, provided only that the conduct include at least one pending state proceeding.

This Court should decide whether a plaintiff who pleads, or can amend to plead, an ongoing course of harassing conduct by state officials, including fraud by them upon the court, is entitled to relief under 42 U.S.C. § 1983. This Court should also decide whether the lower federal courts may turn a blind eye to well-pleaded allegations that state officials have perpetrated a series of frauds upon the federal courts.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

EARL A. PARTINGTON
(Counsel of Record)
PARTINGTON & FOLEY
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 526-9500
Petitioner Pro Se and Counsel for Petitioner Lau

KAREN A. ESSENE
2133 Alaeloa Place
Honolulu, Hawaii 96821
Telephone: (808) 732-2192
Counsel for Petitioner Partington

DATED: September 30, 1992

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, *Plaintiff-Appellant,* v. JOSEPH GEDAN & HOWARD T. CHANG *Defendants-Appellees.*	No. 90-15942 D.C. No. CV-87-0172-ACK

JEFFREY LAU & EARLE A. PARTINGTON, *Plaintiffs-Appellants,* v. HERMAN T.F. LUM, EDWARD H. NAKAMURA, FRANK D. PADGETT, YOSHIMI HAYASHI, JAMES H. WAKATSUKI, JEREMY T. HARRISON, CHARLENE M. NORRIS, JOSEPH M. GEDAN & MARK J. BENNETT, *Defendants-Appellees.*	No. 91-15194 D.C. No. CV-89-0400-ACK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 5, 1991 – Honolulu, Hawaii

Filed April 14, 1992
Amended July 2, 1992

Before: Arthur L. Alarcon, Dorothy W. Nelson, and William C. Canby, Jr., Circuit Judges.

COUNSEL

Earle A. Partington, Partington & Foley, and Karen A. Essene, Honolulu, Hawaii, for plaintiff-appellant Earle A. Partington.

Earle A. Partington, Partington & Foley, Honolulu, Hawaii, for plaintiff-appellant Jeffrey J. Lau.

Paul Alston, Peter Hsieh, Special Deputy Attorneys General, Honolulu, Hawaii, for defendants-appellees Herman T. Lum, Edward H. Nakamura, Frank D. Padgett, Yoshimi Hayashi, James H. Wakatsuki, and Jeremy T. Harrison.

Stanley E. Levin, Special Deputy Attorney General, Honolulu, Hawaii, for defendant-appellee Charlene Norris.

Steven S. Michaels, Girard D. Lau, Deputy Attorneys General, Honolulu, Hawaii, for defendants-appellees Joseph M. Gedan, Howard T. Chang, and Mark J. Bennett.

ORDER

The opinion filed April 14, 1992 is amended as follows:

1. Slip op. at 4030, line 5: The word "questionable" is deleted and replaced with "unconventional"

2. Slip op. at 4036: The full paragraph on that page is deleted and replaced with:

"In resolving this issue, we need not reach the question whether our decision in *Partington I* was binding on the district court for the purposes of Partington's Rule 60(b) motion. Whether or not *Matsuo* represented "new law," nothing remains of the original suit appealed in *Partington I*. In that original suit, the district court had before it Partington's request for injunctive relief from the Rule 13 proceedings. Since the filing of that original suit, however, the Rule 13 proceedings have come to a close. Therefore, a request for injunctive relief from those proceedings is now a moot issue. [original FN 3] Under these circumstances, we find no reason to disturb the district court's judgment with respect to Partington's Rule 60(b) motion. [FN 4]"

3. Slip op. at 4036, footnote 4: The last sentence of the footnote is deleted and replaced with:

"In any event, this argument does not change the fact that his motion is now moot. Moreover, we reject this argument on the merits, as discussed below."

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

With these changes, the petition for rehearing is denied and the suggestion for rehearing en banc rejected.

OPINION

D.W. NELSON, Circuit Judge:

In 1985, plaintiff-appellant Earle Partington served as court-appointed counsel to criminal defendant Clifford Clarke. After his conviction in trial court, Clarke appealed. On appeal, the Hawaii Supreme Court found, *sua sponte*, that Clarke had received ineffective assistance of counsel and reversed his conviction. The Hawaii Supreme Court finding of ineffectiveness, which triggered disciplinary proceedings against Partington, and Partington's argument that he has never been permitted to defend against that finding, are at the center of this complex case. Before this panel, Partington appeals two district court decisions: the district court's denial of his Fed. R. Civ. P. 60(b) motion to vacate judgment in the original federal court case, *Partington v. Gedan*, and its dismissal of his complaint in a related case, *Lau v. Lum*,

Despite the many arguments Partington advances, we find that the causes of action underlying the two cases are simply nonjusticiable in federal court for a wide variety of reasons. Some claims are moot, others are barred by various immunity doctrines, others implicate the *Rooker-Feldman* doctrine, another is subject to *Younger* abstention, and yet others simply fail to identify a federal constitutional deprivation. Accordingly, we affirm the district court's decisions in both *Partington v. Gedan* and *Lau v. Lum*.

FACTS[1]

A. Partington v. Gedan

In 1985, plaintiff-appellant Earle Partington served as defense counsel to Clifford Clarke. Clarke was charged with the abuse and murder of his girlfriend's daughter. During Clarke's highly publicized state trial, Partington made several unconventional strategic decisions, including a refusal to cross-examine the victim's mother and a refusal to make a closing argument before the jury. Clarke was convicted; subsequently, he appealed to the Hawaii Supreme Court. Partington represented him on appeal. At no time did Clarke challenge his conviction on the ground that he received ineffective assistance of counsel.

During the pendency of the appeal, the presiding trial court judge filed a letter with the Office of Disciplinary Counsel of the Hawaii Supreme Court (ODC). In this letter, the judge stated his belief that Partington had given Clarke ineffective assistance of counsel, and that he had done so deliberately so as to create grounds for reversal on appeal. Partington filed a motion with the Hawaii Supreme Court requesting that it remand the case to the trial court to explore the trial judge's complaint. The Hawaii Supreme Court denied his motion, but ultimately reversed Clarke's conviction because it found, *sua*

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[1] Much of the factual and procedural history laid out below is discussed at length in this court's opinion in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989). This history is repeated here as necessary to understand certain events that have taken place since that decision.

sponte, that Clarke had received ineffective assistance of counsel. An unpublished opinion, *State v. Clarke*, was entered to that effect.

As a consequence of *State v. Clarke*, the ODC commenced a Hawaii Supreme Court Rule 13 disciplinary proceeding against Partington. If a conviction is reversed on the ground that the defendant received ineffective assistance of counsel, Rule 13 requires that the Hawaii Supreme Court appoint a Special Master "to determine whether action against the counsel alleged to have been incompetent is warranted." Haw.Sup.Ct.R. 13. The court appointed Joseph Gedan to serve as Special Master. At that time, Partington filed two motions with the Hawaii Supreme Court asking for a clarification of the relationship between its opinion in *State v. Clarke* and the Rule 13 proceedings. Specifically, Partington inquired whether the Rule 13 proceedings would be conducted de novo, allowing him to put on evidence and advance arguments about his trial strategy that he had not had an opportunity to present before the Hawaii Supreme Court decided *State v. Clarke*. Both motions were denied.

In March of 1987, Partington filed suit in federal district court seeking to enjoin the Rule 13 proceeding. He alleged that because the Hawaii Supreme Court had already decided the question of his conduct in *State v. Clarke*, the Rule 13 proceedings would not provide him with the chance to present his federal constitutional claims before an impartial tribunal. The district court abstained, invoking the *Younger abstention doctrine*, *Younger v. Harris*, 401 U.S. 37 (1971). On appeal, this court approved that abstention in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989) (*Partington I*). In deciding *Partington I*,

we relied in part on an April 1987 letter from Hawaii Supreme Court Justices Lum and Padgett to Partington stating that the Rule 13 proceedings would in fact give Partington an opportunity to present evidence and legal arguments defending his trial tactics. Special Master Gedan also represented to Partington that the proceedings would consider de novo his effectiveness as counsel.

After we issued our decision in *Partington I* but before we considered Partington's petition for rehearing, the Hawaii Supreme Court decided *Matsuo v. State*, 778 P.2d 332 (1989). In *Matsuo*, a petitioner convicted of trying to escape from prison appealed his conviction on the ground that his attorney rendered ineffective assistance of counsel. The Hawaii Supreme Court, finding "the record . . . void as to the reasons for trial counsel's decision[s]," remanded the case to the trial court to permit the attorney to explain the decisions in question. *Id.* at 335. The court found that it would be "unfair to implement a Rule 13 proceeding against trial counsel without first giving him an opportunity to explain his side of the story," *Id.* Arguing that under *Matsuo* the Hawaii Supreme Court's opinion in *State v. Clarke* violated his federal constitutional rights, Partington brought the case to our attention. We denied his petition for rehearing.

Partington then filed a motion with the Hawaii Supreme Court to dismiss the Rule 13 proceedings in light of *Matsuo;* his motion was denied. A motion that the justices who had presided in *State v. Clarke* recuse themselves from considering any motion he filed in conjunction with the Rule 13 proceedings was also denied. Partington then filed a motion asking the Hawaii Supreme Court to declare whether, in light of *Matsuo*, the

Rule 13 proceeding would be conducted de novo; this motion, as well as a second motion requesting recusal, was denied in its entirety.

Partington then returned to the district court and filed a Fed. R. Civ. P. 60(b) motion to vacate the judgment in *Partington v. Gedan*.[2] On July 3, 1990, the district court denied his motion, finding that nothing had changed since the date Partington filed his original suit, Partington appeals that denial to this court.

On July 31, 1990, Special Master Gedan determined that Partington had indeed rendered ineffective assistance of counsel to Clarke. After Gedan's decision, the Justices who had participated in the Clarke appeal recused themselves, and on September 24, 1990, a specially constituted Hawaii Supreme Court reviewed Gedan's decision. Rejecting's Gedan's decision on the ground that Gedan had exceeded his authority by conducting a de novo investigation, the court entered an order stating that its original opinion in *State v. Clarke* was the final adjudication of the question of Partington's misconduct. The court then dismissed the Rule 13 proceeding with prejudice. The court also stated that Partington was not in need of corrective action, and that Rule 13 was not unconstitutional.

In its order, the court stated that it might be appropriate for the ODC to institute a Hawaii Supreme Court Rule 2 proceeding against Partington. Under Rule 2, the ODC is authorized generally to investigate allegations of

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[2] Partington also filed a motion for summary judgment at that time.

ethical violations. Unlike Rule 13, Rule 2 explicitly permits attorneys to put on evidence and otherwise defend their actions. Investigators, in turn, have the option of determining that an ethics violation did not occur. In July 1991, the ODC instituted formal Rule 2 proceedings against Partington.

B. Lau v. Lum

In April of 1989, Partington was serving as defense counsel to Jeffrey Lau in a criminal appeal pending before the Hawaii Supreme Court. Partington filed a motion with the court asking for permission to withdraw as Lau's counsel, stating that he could not draft an adequate opening statement within the period designated under an earlier court order. On behalf of the court, Justice Padgett stated that Partington's inability to meet the briefing schedule was caused by Partington's own failure to file a timely motion to adjust the schedule for docketing the appeal. The court gave Partington additional days to prepare his opening statement, but imposed a fifty-dollar sanction on him. The fine was payable to the "Discretionary Fund" of the Dean of the University of Hawaii Law School, the beneficiary of all such fines.

Partington filed several motions protesting the fine, arguing that he had been singled out for sanctions for a practice that was common among Hawaii attorneys, and requesting an evidentiary hearing on the question whether the imposition of the fine was unconstitutional. The Hawaii Supreme Court responded with an order denying the relief requested, Partington paid the fine under protest to the Discretionary Fund.

Partington then filed an action in district court under 42 U.S.C. § 1983. His complaint alleged that the Hawaii Supreme Court justices and the dean of the law school had violated several of his constitutional rights by levying and collecting the fine. He sought declaratory relief, an injunction to compel the return of the fifty dollars, and an award of fees and costs. Partington then filed an amended complaint in which he claimed 1) that his due process rights had been violated by the finding of ineffectiveness in *State v. Clarke*, 2) that Justice Padgett had violated his constitutional rights when, during the course of a separate trial (*State v. Denton*) he expressed his belief that Partington was rendering ineffective assistance of counsel, and 3) that the Hawaii Supreme Court was impairing his constitutional rights under the First Amendment and the Sixth Amendment. Partington requested additional relief, including declaratory and injunctive orders concerning the propriety of Partington's conduct as defense counsel in *State v. Clarke*, *State v. Lau*, and *State v. Denton*.

Partington then filed a second amended complaint in which he named the Rule 13 Special Master, the Rule 13 special prosecutor, and the ODC attorney conducting the Rule 2 investigation as additional defendants. He added claims requesting declaratory and injunctive relief against the ongoing Rule 13 proceeding, and injunctive relief preventing the State from "requiring him to violate the attorney-client privilege in response to Rule 2 inquiries."

While *Law v. Lum* was pending, the specially constituted Hawaii Supreme Court dismissed the Rule 13 proceedings, as discussed above. Partington then moved the district court for leave to file a third amended complaint

in which he hoped to include new claims against Justices Lum and Padgett and Special Master Gedan for their "misrepresentation and fraud" based on Lum and Padgett's 1987 letter and Gedan's assurances stating that the Rule 13 proceeding would be conducted de novo. He also filed a motion for sanctions under Fed. R. Civ. P. 11, arguing that the defendants had made frivolous affirmative defenses as well as misrepresentations regarding the law and facts concerning the imposition of the fifty dollar fine.

Shortly after Partington sought leave to file, the district court dismissed his second amended complaint and denied the requests for injunctive relief contained therein. The magistrate denied his motion to file a third amended complaint, and the district court affirmed this denial, primarily because it found that the new claims were barred by the defendants' absolute judicial immunity. Finally, the district court denied the Rule 11 motion.

Partington now appeals the district court's dismissal of his second amended complaint and denial of the requests for injunctive relief contained therein, its denial of his motion for leave to file an amended complaint, and its denial of his motion for Rule 11 sanctions.

DISCUSSION

The two cases before us were consolidated for the purposes of this appeal, but we will consider and discuss each of them separately.

I. Partington v. Gedan

A. *Standard of Review*

A denial of a motion for relief from judgment pursuant to Rule 60(b) is reviewed for an abuse of discretion. *Thompson v. Housing Authority of the City of Los Angeles*, 782 F.2d 829, 832 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

B. *Discussion*

Partington argues that the district court should have granted his 60(b) motion because the Hawaii Supreme Court decided *Matsuo* after the district court rendered its original decision. According to Partington, *Matsuo* represented sufficiently new information or law such that the district court's original disposition should be vacated. In denying his motion, the district court found that Partington had not presented any new evidence or law that was not before the Ninth Circuit when it denied his petition for rehearing. The district court concluded that in light of the Ninth Circuit's *Partington I* opinion and its subsequent refusal to rehear the case, it was found by the "law and of the case."

In resolving his issue, we need not reach the question whether our decision in *Partington I* was binding on the district court for the purposes of Partington's Rule 60(b) motion. Whether or not *Matsuo* represented "new law," nothing remains of the original suit appealed in *Partington I*. In that original suit, the district court had before it Partington's request for injunctive relief from the Rule

13 proceedings. Since the filing of that original suit, however, the Rule 13 proceedings have come to a close. Therefore, a request for injunctive relief from those proceedings is now a moot issue.[3] Under these circumstances, we find no reason to disturb the district court's judgment with respect to Partington's Rule 60(b) motion.[4]

II. Lau v. Lum

A. *Dismissal of Complaint*

In his second amended complaint, Partington advanced ten "claims for relief." After considering and discussing each claim, the district court dismissed the entire complaint. Partington's claims for relief are as follows:

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[3] On appeal in *Partington I*, Partington had also requested a declaratory judgment that the Rule 13 proceedings were unconstitutional as applied to him. However, we explicitly noted that Partington had not raised that particular request before the district court, and therefore declined to consider it. 880 F.2d at 129. Therefore, all the district court had before it was the request for injunctive relief.

[4] Partington advances a second argument why the district court erred in denying his 60(b) motion. He argues that the district court erred in holding that the *Partington I* panel's determination that "the attorney-client issue turns on a question of state law," 880 F.2d at 123, was not a "clearly erroneous ruling" that would work a "manifest injustice" on Partington. Partington does not explain what gives district courts the power to declare the decisions of appellate panels "clearly erroneous." In any event, this argument does not change the fact that his motion is now moot. Moreover, we reject this argument on the merits, as discussed below.

Claim 1: A declaratory judgment that the defendants violated Partington's constitutional rights by making the finding of ineffective assistance of counsel in *State v. Clarke;*

Claim 2: A declaratory judgment that the defendants violated Partington's rights by imposing the fifty-dollar sanction in *Lau v. Lum;*

Claim 3: A declaratory judgment that defendant Padgett violated Partington's constitutional rights by accusing him of giving ineffective assistance of counsel in *State v. Denton;*

Claim 4: A declaratory judgment that the defendants are violating Partington's constitutional rights "by refusing to provide him with an allegation or charge and/or a settled or established procedure in the Rule 13 proceeding";

Claim 5: A declaratory judgment that the defendants are violating Partington's rights by their "continuing course of conduct of sanction, accusation, and findings" combined with their "failure to utilize in good faith" disciplinary proceedings pursuant to Rule 13 and Rule 2;

Claim 6: A declaratory judgment that if Partington conducts himself as he has in the past, "it must be assumed that" he is rendering effective assistance of counsel;

Claim 7: an order directing the return of the fifty dollars;

Claim 8: An injunction against further Rule 13 proceedings;

Claim 9: An injunction preventing the ODC from requiring Partington to violate the attorney-client privilege in response to Rule 2 inquiries; and

Claim 10: An injunction restraining the defendants from "santioning, accusing, or making findings of unprofessional conduct" without affording Partington "prior notice and an opportunity to be heard."

Because the Rule 13 proceedings have come to a close, Partington's Claims 4 and 8 are now moot; we need not discuss those claims.[5] Because Partington does not raise a challenge to the district court's disposition of Claim 3, we also need not discuss Claim 3.[6] We have considered each remaining claim and conclude that the district court properly dismissed all of them. Accordingly, we affirm the district court's dismissal of the complaint. We discuss each claim below.

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[5] Partington apparently concedes this point. Appellant's Opening Brief at 19, note 25.

[6] Nor could he raise such a challenge. The district court held that this action was barred because of Hawaii Supreme Court Justice Padgett's judicial immunity. Although immunity would not prevent a suit for declaratory relief, plaintiffs must allege more than mere reputational damage to maintain a suit under Section 1983. *Paul v. Davis,* 424 U.S. 693 (1976). Even if we assume that Padgett's reprimand of Partington caused Partington some reputational damage, Partington cannot bring a Section 1983 suit because he has failed to allege any deprivation of constitutional magnitude stemming from that courtroom comment.

1. *Claims 1 & 5*

a. *Res Judicata*

The district court held that since Claims 1 and 5 were duplicative of the claims and causes of action raised in *Partington I,* they were barred by res judicata and could not be considered. We find the district court's conclusion on this issue erroneous.

"[A] prior judgment is res judicata only as to suits involving the same cause of action." *Lawlor v. National Screen Service,* 349 U.S. 322, 329 (1955). In determining whether a particular action is barred because of res judicata, we ordinarily examine:

> (1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-1202 (9th Cir.) (citation omitted), *cert. denied,* 459 U.S. 1087 (1982). For the purposes of this case, however, we need not engage in this inquiry because an abstention on *Younger* grounds simply does not establish any "rights or interests."

A decision to abstain for *Younger* reasons is not a decision on the merits of a claim. *World Famous Drinking Emporium Inc. v. City of Tempe,* 820 F.2d 1079, 1083 (8th Cir.

1987). In approving the district court's decision to abstain, we did not consider the merits of Partington's constitutional claims. *Partington I* thus established no "rights or interests" that could be "destroyed or impaired" by the subsequent actions in *Lau v. Lum*. To the contrary: because *Partington I* dealt only with whether *Younger* abstention was appropriate in response to a request to enjoin an ongoing state proceeding, it established only that the federal district court properly declined to enjoin state disciplinary hearings.[7] That decision cannot be res judicata as to the claims advanced in *Lau v. Lum*.

b. *Failure to State a Claim: Claim 1*

Having concluded that Partington's actions are not barred by res judicata, we turn first to the question whether Partington's Claim 1 states a claim under 42 U.S.C. § 1983.[8] Although the district court did not address this question, we may affirm a district court opinion on any basis finding support in the record, *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir.), *cert. denied*, 474 U.S. 1021 (1985).

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[7] Although Partington did ask for declaratory relief for the first time on appeal, we explicitly declined to adjudicate that request. *See supra* note 3.

[8] We note, as an initial matter, that because Claims 1 and 5 request declaratory relief, they are not jurisdictionally barred despite the fact that the defendants enjoy absolute judicial and prosecutorial immunity. Immunity protects judges and their agents from suits involving *monetary* damages. *See Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc).

Under Section 1983, a would be litigant must allege (1) that he or she has suffered a "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws," and (2) that the deprivation was caused by a person acting under color of law. *See* 42 U.S.C. § 1983. Because we conclude that Claim 1 fails to meet the first prong of this test, we find it does not state a claim under section 1983.

Partington argues that the Hawaii Supreme Court violated his rights by making a finding of ineffective assistance of counsel in *State v. Clarke.* In so doing, however, Partington fails to specify which constitutional rights were violated and are actionable under section 1983. In reversing Clifford Clarke's conviction, the Hawaii Supreme Court did not deprive Partington of any liberty or property interest. The court placed no limit on Partington's ability to practice law. At most, Partington alleges only that his reputation within the legal community has suffered as a result of the court's decision. However, as the Supreme Court made clear in *Paul v. Davis,* 424 U.S. 693 (1976), reputational damage alone simply does not constitute the sort of constitutional deprivation necessary to allege a violation of section 1983.

In *Paul v. Davis,* the police distributed to local merchants a list of "active shoplifters" being plaintiff Davis's name and photograph. Davis filed suit under section 1983. Although the plaintiff's employer had warned him that similar future behavior might cost him his job, he alleged no other harm. The Supreme Court, concluding that Davis could not bring a section 1983 suit, rejected the argument that "reputation alone, apart from some more tangible interests such as employment, is either 'liberty'

or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. In line with this principle, this circuit permits section 1983 suits only when the defamation which causes the reputational damage is accompanied by additional harm, usually loss of employment. *See e.g., Fleming v. Dep't of Public Safety,* 837 F.2d 401, 408 (9th Cir.), *cert. denied,* 488 U.S. 889 (1988) (finding that reputational injury that delayed job offer by a few days not a "cognizable injury" under section 1983); *Brady v. Gibbie,* 859 F.2d 1543, 1552-53 (9th Cir. 1988), *cert. denied,* 489 U.S. 1100 (1989) (holding that employee stigmatized during the course of wrongful discharge alleged harm cognizable under section 1983).

Partington argues that *Miller v. Washington State Bar Ass'n,* 679 F.2d 1313 (9th Cir. 1982), supports the idea that "damage to one's livelihood as an attorney" is cognizable under section 1983. In that case, attorney Miller received a private Letter of Admonition from the Washington State Bar after he published a poem critical of the Washington Supreme Court. The Letter of Admonition became a permanent part of Miller's record. As the state conceded, Miller "would be called upon to explain the presence of the admonition in his file in response to questions on applications for admission to the bars of other states, for judicial appointments, etc., relating the disposition of any complaints filed against him." *Id.* at 1316. Miller sued under section 1983, alleging that the state bar had violated his First Amendment rights. The state bar responded that Miller was not "adversely affected" because the letter was private and did not revoke or suspend the appellant's right to practice law. *Id.* at

1316-17. Rejecting that argument, we concluded that Miller had stated a claim.

Partington's reliance on *Miller* is misplaced. First, unlike Miller, Partington has not alleged any concrete, tangible damage to his livelihood. Second, the case is inapposite for the simple reason that Miller claimed a First Amendment violation in addition to any reputational damage he may have suffered. In other words, Miller alleged a separate constitutional deprivation which independently was sufficient to sustain a section 1983 action. Partington, on the other hand, has not indicated that the Hawaii Supreme Court's statement in *State v. Clarke* deprived him of any constitutionally protected property or liberty interests or caused him any harm other than that allegedly done to his reputation. That allegation is not enough to sustain a section 1983 claim. Under the circumstances, the district court properly dismissed Claim 1.

c. *Younger Abstention: Claim 5*

In Claim 5, Partington sought a declaratory judgment from the district court that the defendants were violating his rights by their "continuing course of conduct of sanction, accusation, and findings" combined with their "failure to utilize in good faith" disciplinary proceedings pursuant to Rule 13 and Rule 2. The district court held that, to the extent that Claim 5 was not barred by res judicata, it was subject to *Younger* abstention. We agree.

Claim 5 is based in part on the Rule 2 disciplinary investigation. In that regard, it clearly seeks relief with

respect to a pending state proceeding. The *Younger* doctrine precludes not only federal injunctive relief against pending state enforcement proceedings, but also declaratory proceedings. *Samuels v. Mackell*, 401 U.S. 66, 69-74 (1971). It also applied to state bar disciplinary proceedings. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). Thus, the district court rightly invoked *Younger* abstention.

By alleging that the state was not utilizing its disciplinary proceedings in "good faith," Partington appears to have been attempting to bring his request for declaratory relief within the "bad faith and harassment" exception to *Younger* abstention. *See Younger*, 401 U.S. at 47-49, Partington's allegations, however, fall far short of establishing bad faith of the sort sufficient to invoke that exception. There was no allegation of repeated harassment by enforcement authorities with no intention of securing a conclusive resolution by an administrative tribunal or the courts, *see id.*, or of pecuniary bias by the tribunal, *see Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). Partington has alleged no interference with his federal rights in connection with the Rule 2 proceedings that cannot be addressed in the course of the state proceedings, including direct appeals therefrom and review by certiorari in the Supreme Court of the United States. In short, the district court did not err in concluding that Claim 5 was subject to *Younger* abstention.

2. *Claims 6 and 10*

Partington argues that the district court erred in dismissing Claims 6 and 10 because "a complaint cannot be

dismissed on the basis of the particular relief prayed for, so long as some relief may be granted."[9] The record indicates that the district court properly dismissed Claims 6 and 10 for a lack of subject-matter jurisdiction. In refusing to grant the declaratory relief requested in Claim 6, the district court noted that Partington "had not suffered any actual or threatened injury concerning any future conduct." Article III of the constitution requires that a would-be federal litigant allege some actual or threatened injury before a court can gain jurisdiction over the purported suit – the injury cannot exist in the abstract. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). In asking the district court to judge his future conduct as an attorney, Partington fails to identify the injury that undergirds his standing to sue. At this stage, any ruling from a federal district court would be an advisory opinion, something federal courts cannot give. In the absence of some concrete threatened injury, Article III bars the relief requested in Claim 6.

Similarly, in refusing to grant the injunctive relief requested in Claim 10, the district court noted that Partington's request was "little more than a request for the Hawaii Supreme Court to comply with the rights of due

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[9] Partington also objects to the district court's dismissal of Lau as a party to the suit, on the ground that Partington had not requested any relief for Lau. Because we hold that the district court properly dismissed this portion of the complaint, we need not reach this challenge. Moreover, because the relief Partington requests is all nonmonetary (because of the defendants' judicial immunity), whether Lau remains a named party to the suit appears irrelevant.

process in the future." As such, Partington's complaint failed to articulate the likelihood that the Hawaii Supreme Court will mistreat Partington in the future – if, indeed, it has in the past. Past deprivation by itself is not enough to demonstrate the likelihood of future deprivations such that the requirements of Article III are met. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Golden v. Zwickler*, 394 U.S. 102, 109 (1969). Without such a concrete likelihood, the case or controversy requirement cannot be met. Partington has failed to allege sufficient facts to demonstrate an appreciable likelihood that the Hawaii Supreme Court will do anything in the future to violate his rights. Therefore, the district court properly dismissed this claim for a lack of case or controversy.

3. *Claim 9*

In denying Claim 9's request for injunctive relief, the district court found that Partington had not met his burden of proving a likelihood of success on the merits of his claim – that is, in demonstrating that he is foreclosed from disclosing confidential attorney-client communications in response to ODC inquiries.[10] Partington argues that because the attorney-client privilege is a part of a defendant's Sixth Amendment right to counsel, only Clarke can waive the privilege. Because Clarke has not waived the privilege, Partington asserts that he cannot disclose any confidences to the ODC. The amicus briefs filed on Partington's behalf advance this argument as well.

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[10] The district court also based its decision on the alternate theory that abstention was required by *Younger*.

In rejecting this argument, the district relied on the *Partington I* court's analysis. In *Partington I*, we "interpret[ed] this argument to mean that Partington believes that Hawaii's interpretation of the attorney-client privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense." 880 F.2d at 123. As we pointed out then, it is for Partington to demonstrate that Hawaii will interpret its own rules to conclude that revealing client confidences in the course of a disciplinary hearing is impermissible.

We agree with the district court that Partington has failed to meet his burden. Nothing in the record indicates that Hawaii would prevent Partington from presenting a complete defense. To the contrary, Hawaii provides that an attorney may violate the privilege under certain circumstances, such as when "required by law" or when "necessary to . . . defend himself . . . against accusations of wrongful conduct."[11] While none of the exceptions explicitly sanctions the violation of the privilege during the course of disciplinary hearings, in the absence of

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[11] Hawaii Disciplinary Rules, DR 4-101, *Preservation of Confidences and Secrets of a Client*, §§ (C)(2) & (4) provide that an attorney may reveal.

> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

evidence to the contrary, "[f]ederal courts 'cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.' " *Partington I*, 880 F.2d at 123 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)).[12]

On this appeal, Partington advances a second argument; that even if Hawaii permits him to reveal the confidences, he still may not do so because to do so would violate Clarke's Sixth Amendment rights. Although this is an interesting and novel argument, we cannot agree.

As we have made clear, "[s]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985), *cert. denied*, 475 U.S. 1088 (1986) (citations omitted). Accordingly, the scope of the privilege is a function of state law, not federal constitutional law, as Partington argues. A violation of the attorney-client privilege implicates the Sixth Amendment right to counsel only under certain circumstances – specifically, when the government interferes with the relationship between a criminal defendant and his attorney. *See Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire*, 838 F.2d 13, 19 (1st Cir. 1988) ("The sixth amendment provides a shield for the attorney-client privilege only in criminal proceedings; upon the termination of those proceedings and initiation of a civil action putting the privilege at issue, that *constitutional* protection

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[12] Significantly, Partington has not claimed that Hawaii interpreted its disciplinary rules in the course of the Rule 13 proceedings so as to prevent him from explaining his conduct.

ends.") (emphasis in original). Moreover, before it amounts to a violation of the Sixth Amendment, any government interference with the privilege must substantially prejudice the criminal defendant, *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977); *United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991); *Clutchette*, 770 F.2d at 1471.

Partington's invocation of the Sixth Amendment does not meet these conditions. The Rule 2 disciplinary hearings are not criminal proceedings, and Clifford Clarke, the person whose Sixth Amendment rights are allegedly at stake, is not a party to this suit. *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2nd Cir. 1991) ("The privilege against disclosure belongs to the client, not the attorney.") Moreover, Partington has not alleged that Clarke has been prejudiced, or is likely to be prejudiced, if Partington reveals any confidences in his own defense. Thus, Partington cannot overcome the mandate of *Weatherford:* without prejudicial effect to a criminal defendant, there is no Sixth Amendment violation.

Partington's invocation of the Sixth Amendment is, in a sense, premature. We fully recognize the potential harm a criminal defendant stands to suffer if the state forces his attorney to hand over critical secrets. However, if and when it becomes necessary, the Sixth Amendment right to counsel *will* stand as a bar to any governmental use of information obtained in violation of a defendant's attorney-client privilege. For Partington to invoke the Sixth Amendment at this stage, however reflects a misunderstanding of the relationship between the attorney-

client privilege and a criminal defendant's Sixth Amendment right to counsel.[13]

Partington has not demonstrated that the state of Hawaii will interpret its own ethical rules to prevent him from revealing client confidences if necessary to defend himself in the Rule 2 proceedings. Nor has he demonstrated any constitutional bar to his doing so without his client's waiver of the privilege. We conclude, therefore, that the district court's denial of the preliminary injunction was correct.

4. *Claims 2 & 7*

The district court dismissed Claim 2 and Claim 7 on the ground that it had no jurisdiction under the *Rooker-Feldman* doctrine and the Eleventh Amendment to grant the relief requested.

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[13] Partington's argument is limited to revelations made in the context of state disciplinary hearings. However, if there are Sixth Amendment problems with permitting an attorney to violate the privilege in defending against an accusation of misconduct, the problems are no greater than or different from the problems inherent in permitting an attorney to violate the privilege when attempting to collect remuneration for services, or to prevent the client from doing someone serious bodily harm. Certainly, the harm that a defendant suffers when confidences are revealed does not vary according to the reasons for the attorney's revelation. If we were to accept Partington's argument, then, we would have to hold that the constitution forbids attorneys from revealing confidences under *any* circumstances.

a. *Standard of Review*

The existence of subject matter jurisdiction is a question of law we review de novo. *Kruso v. Inter. Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3217 (1990). We accept the district court's factual findings supporting the exercise of jurisdiction unless the findings are clearly erroneous. *Stock West, Inc. v. Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

b. *Discussion*

Partington's challenge to the Hawaii Supreme Court's imposition of the fifty-dollar fine is similar to the challenge brought in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). In *Feldman*, the plaintiff sought to challenge in the United States District Court for the District of Columbia a decision rendered by the District of Columbia Court of Appeals. The District of Columbia Court of Appeals had refused to grant the plaintiff a waiver of a certain bar admission rule; plaintiff challenged both the court's decision denying waiver of the rule and the constitutionality of the rule itself. The Supreme Court held that although the plaintiff could challenge the constitutionality of the state-court *rule* in federal court, he could not challenge "state-court *decisions* in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Id.* at 486 (emphasis added); *accord Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Under the "*Rooker-Feldman* doctrine," review of state

court decisions may only be conducted in the United States Supreme Court. Lower federal courts may not review such decisions.

In this instance, Partington did not even allege in federal district court that the rule under which he was sanctioned is unconstitutional. Rather, he asked the district court to review a specific state court decision interpreting a state court rule: the Hawaii Supreme Court's decision to sanction and fine him for violating that court's rules regarding the filing of motions. Partington's request thus collides head-on with the jurisdictional bar of *Rooker-Feldman* doctrine.

Partington, relying on this court's decision in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985) (subsequent history omitted), argues that *Rooker-Feldman* is inapplicable because the Hawaii Supreme Court never considered his constitutional claims as to why the sanction was improper. In *Robinson*, the Hawaii Supreme Court had explicitly refused to hear federal constitutional claims raised in a plaintiff's petition for rehearing. *Id.* at 1472. In light of this explicit refusal, we approved the federal district court's entertainment of constitutional claims that the state court had refused to consider.

The defendants argue that Partington presented his constitutional arguments to the Hawaii Supreme Court in the form of a written objection to the sanction. Partington responds that the written document he filed was only a request to be heard, and that in refusing him an evidentiary hearing before upholding the sanction, the Hawaii Supreme Court refused to hear his complete constitutional arguments. For its part, the Hawaii Supreme Court,

in its order upholding the sanction, stated that it had given "plenary consideration" to all of Partington's claims.

"The lawyer subject to discipline is entitled to procedural due process, including notice and an opportunity to be heard," *Rosenthal v. Justices of the S. Ct. of California,* 910 F.2d 561, 564 (9th Cir. 1990) (citations omitted), *cert. denied,* 111 S. Ct.963 (1991). An opportunity to be heard, however, does not necessarily include an opportunity to present one's arguments orally. The record indicates that Partington filed a motion requesting an evidentiary hearing *as well as* a three-page Memorandum of Points and Authorities in support of his request. Partington himself concedes that he "sketched out" his arguments in his papers. In this case, therefore, we see no reason to disbelieve the state tribunal that Partington's arguments were fully considered, the lack of an evidentiary hearing notwithstanding. In *Robinson,* by contrast, the state court explicitly refused to consider the relevant claims. We find that Partington simply has not alleged an "inability to be heard" that is analogous to the inability of the plaintiffs in *Robinson,* or that justifies a departure from the strictures of *Rooker-Feldman.*

Partington's attempts to secure a return of the fifty dollars are also jurisdictionally barred. Not only does the *Rooker-Feldman* doctrine prevent us from considering the merits of the underlying claim, Partington cannot get the money back because the Eleventh Amendment clearly grants the states immunity from retroactive monetary relief in federal court. *Hutto v. Finney,* 437 U.S. 678, 690 (1978). Partington argues that because the fifty dollars is in a separately maintained "discretionary fund," it is not

in the "state treasury." He argues, in essence, that the University of Hawaii Law School is not an agency of the state such that its funds can be properly considered a part of state revenues. This position, however, was addressed and rejected in *Hall v. State of Hawaii*, 791 F.2d 759 (9th Cir. 1986). In *Hall*, we considered whether Hawaii's Eleventh Amendment immunity protecting it against suits based on state-law claims extended to the University of Hawaii, the Law School, and the board of regents. We concluded that those entities were "clearly immune as agencies of the state." *Id.* at 761. Logically extending our analysis in *Hall*, we find that as "agencies of the state" which enjoy Eleventh Amendment immunity from the suits considered in *Hall*, these entities also enjoy immunity from suits for monetary relief based on federal constitutional claims.

B. *Rule 11 motion for sanctions*

1. *Standard of Review*

This court reviews a district court's rulings on Rule 11 motions for an abuse of discretion. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1365-66 (9th Cir. 1990) (En banc).

2. *Discussion*

Partington argues that the district court should have granted his motion for sanctions because the defendants raised frivolous affirmative defenses in their answer to his complaint and made misrepresentations to the district

court about the conduct leading to his fifty-dollar sanction. We find his position wholly untenable.

In its twenty-two page opinion considering Partington's Rule 11 motion, the district court considered each of the defendant's answers, and concluded that under the circumstances most were not frivolous. Similarly, it found that each "misrepresentation" the defendants made was in fact a legal argument they were entitled to make. In the end, the court held that "at *most*, Partington has established that one or two of the defenses alleged by Defendants in their Answer may not be applicable to the case." The district court held further that even if one or two defenses were inapplicable, sanctions were inappropriate because the Answer as a whole was otherwise sound.

We have reviewed the record, and find nothing which supports disturbing the district court's disposition of Partington's Rule 11 motion. The district court did not abuse its discretion in denying the motion.

C. *Denial of Leave to Amend the Complaint*

a. *Standard of Review*

This court reviews a district court's denial of leave to amend pleadings after a responsive pleading has been filed for an abuse of discretion. *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1206 (9th Cir. 1988).

b. *Discussion*

The district court denied the motion to amend primarily because it determined that the claims for relief were barred by judicial immunity. It is well settled that "[j]udges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official functions." *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). Partington argues that the justices' letter and Gedan's statements were not an exercise of official judicial functions.

"[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). In this case, the justices wrote the letter opining on the nature of the Rule 13 proceeding within their capacity as arbiters of the Hawaii Disciplinary Rules. The promulgation and enforcement of a state's rules of ethics is frequently a function of the judiciary. *See Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 734 (1980) ("legislative" function of the Virginia Supreme Court in promulgating Virginia Bar Code protected by absolute judicial immunity). Partington's arguments notwithstanding, the writing of the letter was not an "administrative function" with consequences that are unprotected by judicial immunity. Administrative functions are actions which are significant independent of the fact that the actor is a judge, such as the hiring or firing of staff members. *Forrester v. White*, 484 U.S. 219, 228-30 (1988). For Partington and the other attorneys to whom

the letter was sent, the letter's significance was very much a function of its authors' judicial offices. Moreover, we have in the past found that behavior which appears far less "judicial" than the conduct at issue here is protected by judicial immunity. *See, e.g., Mireles v. Waco*, ___ U.S. ___, 112 S. Ct. 286, 287 (1991) (instruction to court officers to forcibly bring attorney into courtroom); *Ashelman*, 793 F.2d 1074 (conspiracy between a judge and a prosecutor to predetermine the outcome of a trial).

We agree with the district court that Partington's third amended complaint could not have overcome the bar to relief imposed by judicial immunity.[14] that the letter in question turned out to contain erroneous information does not alter that immunity. The district court did not abuse its discretion in denying Partington leave to amend his complaint a third time.

CONCLUSION

We AFFIRM the district court's denial of Partington's Rule 60(b) motion in *Partington v. Gedan*. We AFFIRM the

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[14] On appeal, Partington's arguments have centered only on whether the writing of the letter was a judicial function. However, his third amended complaint contains three requests for nonmonetary relief that, by virtue of not asking for damages, are unaffected by that inquiry. Nevertheless, these requests notwithstanding, we find that the district court did not err in denying the motion to amend. The three requests mirror, for the most part, the many requests for relief contained in the second amended complaint. Two of the requests suffer from the jurisdictional defects discussed earlier. Under the circumstances, we have no difficulty concluding that the district court did not abuse its discretion in denying Partington leave to amend.

district court's dismissal of the complaint in *Lau v. Lum*. We AFFIRM the district court's decision not to impose Rule 11 sanctions and AFFIRM its refusal to permit Partington to amend his pleadings a third time.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EARLE A. PARTINGTON, Plaintiff, vs. JOSEPH M. GEDAN and HOWARD T. CHANG Defendants.	)	CIVIL NO. 87-0L17 (Filed July 3, 1990)

ORDER DENYING RULE 60(b) MOTION & MOTION FOR SUMMARY JUDGMENT AND MOTION FOR RULE 11 SANCTIONS

The underlying cause of action in this case was Plaintiff's March 9, 1987 suit filed pursuant to 42 U.S.C. § 1983. Plaintiff moved for declaratory judgment and injunctive relief, alleging violations of various Constitutional rights and seeking to enjoin Defendants from any further proceedings against him pursuant to Hawaii Supreme Court Rule 13 for allegedly rendering ineffective assistance of counsel in ***State v. Clarke,*** No. 10041 (Haw. Dec. 27, 1985).

This Court concluded that abstention under ***Younger v. Harris,*** 401 U.S. 37 (1971) was appropriate because Plaintiff could raise his Constitutional challenges in the Rule 13 proceedings. Accordingly, on July 1, 1987, this Court issued its order granting Defendants' motion to dismiss and denying Plaintiff's motion for summary judgment. The Ninth Circuit treated the dismissal of the Complaint as a dismissal of the action. ***Partington v.***

Gedan, 880 F.2d 116, 120 (9th Cir. 1989), **reh. denied**, No. 87-2375 (9th Cir. 1989). The United States Court of Appeals for the Ninth Circuit, on March 13, 1989, affirmed this Court's decision invoking *Younger* abstention.

The instant motions before this Court are (i) Plaintiff's Rule 60(b) motion requesting this Court to vacate its July 1, 1987 Order and to grant summary judgment in his favor on the March 9, 1987 suit filed pursuant to 42 U.S.C. § 1983, and (ii) Plaintiff's motion for Rule 11 sanctions against defense counsel.

This Court exercises jurisdiction over Plaintiff's Rule 60(b) motion pursuant to the decision by the Ninth Circuit in *Gould v. Mutual Life Ins.*, 790 F.2d 769 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986), which adopted the rule that once the appellate mandate has issued, leave of the Ninth Circuit is not required for the district court to consider a Rule 60(b) motion. *Id.* at 773, *citing, Standard Oil Co. of California v. United States*, 429 U.S. 17, 18-19 (1976).

Plaintiff argues (i) that *Matsuo v. State*, 778 P.2d 332 (Haw. 1989), combined with Rule 40(f), Hawaii Rules of Penal Procedure ("HRPP"), constitutes a controlling change in applicable law, and (ii) that the Ninth Circuit's decision that the attorney-client privilege issue turns on a question of state law was a "clearly erroneous ruling" that would work a manifest injustice. This Court concludes that both of Plaintiff's arguments are without merit.

CONCLUSION

Plaintiff has presented no relevant new evidence or law that was not before the Ninth Circuit when it denied Plaintiff's motion for rehearing. In addition, it is the conclusion of this Court that ***Matsuo v. State*** combined with HRPP Rule 40(f) does not constitute a controlling change in applicable law. Nor can this Court conclude that the Ninth Circuit's decision that the attorney-client privilege issue turns on a question of state law was a "clearly erroneous ruling" that would work a manifest injustice to Plaintiff. Accordingly, the law of the case doctrine is applicable and it cannot be concluded that this Court's denial of Plaintiff's requests that it vacate its July 1, 1987 order and overrule the Ninth Circuit in ***Partington v. Gedan*** is inconsistent with considerations of substantial justice.

In accordance with the foregoing and in the interests of justice, Plaintiff's Rule 60(b) motion is hereby denied, his motion for summary judgement is perforce denied and his Motion for Rule 11 sanctions is also denied.

When this Court granted Defendants' motion to dismiss, it entered a final judgment pursuant to that order which this Court intended to constitute a dismissal of both the Complaint and the action. Pursuant to this Order, Plaintiff's cause of action is once again dismissed.

DATED: Honolulu, Hawaii July 3, 1990.

/s/ Alan C. Kay
United States District Judge

PARTINGTON v. GEDAN & CHANGE CIVIL NO. 87-0172: ORDER DENYING RULE 60(b) MOTION. MOTION FOR SUMMARY JUDGMENT AND MOTION FOR RULE 11 SANCTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JEFFREY J. LAU and EARLE A. PARTINGTON, Plaintiffs, vs. HERMAN T.F. LUM, EDWARD H. NAKAMURA, FRANK D. PADGETT, YOSHIMI HAYASHI, JAMES H. WAKATSUKI, JEREMY T. HARRISON, CHARLENE NORRIS, JOSEPH M. GEDAN, and MARK J. BENNETT, Defendants.	CIVIL NO. 89-00400 ACK (Filed Dec. 17 1990)

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING MOTION TO DISMISS

INTRODUCTION

On August 27, 1990, pro se Plaintiff Earle A. Partington, an attorney licensed to practice law in the State of Hawaii, appeared before this Court requesting that the United States District Court preliminarily enjoin the Hawaii Supreme Court and its agents from undertaking any proceedings against him pursuant to Hawaii Supreme Court Rules 2 and 13 ("HSCR") arising out of his defense of Clifford M. Clarke in ***State of Hawaii v. Clarke,*** Cr. No. 59285 (1st Cir. Haw. 1984). Partington's Second Amended Complaint, brought under Title 42 U.S.C. § 1983, requests declaratory and injunctive relief,

as well as an order directing Defendant Jeremy Harrison, Dean of the William S. Richardson School of Law, University of Hawaii, to reimburse Partington for a $50.00 fine imposed upon him by the Supreme Court of Hawaii for failure to follow state court procedures in pursuing the criminal appeal of Plaintiff Jeffrey Lau.[1] No relief has been requested for Plaintiff Jeffrey Lau. Indeed, Defendants have vigorously argued that Mr. Lau has no standing in the instant action. Because Partington, as attorney for Jeffrey Lau in this action, has presented no basis whatsoever for Mr. Lau's standing, and because this Court has been unable to divine such standing on its own, this action against Defendants on behalf of Mr. Lau is hereby dismissed for lack of standing.

Defendants in this action consist of all five justices of the Supreme Court of Hawaii who were sitting at the time of ***State v. Clarke;*** Jeremy T. Harrison, Dean of the William S. Richardson School of Law, University of Hawaii; Charlene M. Norris, Assistant Disciplinary Counsel at the Office of Disciplinary Counsel ("ODC") of the Supreme Court of Hawaii; Joseph M. Gedan, Special Master in Partington's Rule 13 proceeding; and Mark J. Bennett, Special Prosecutor in Partington's Rule 13 proceeding. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint was also heard on August 27, 1990.

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[1] Partington paid the $50.00 fine, under protest, into the Dean's Discretionary Fund, University of Hawaii.

DISCUSSION

Preliminary Injunction

Partington's motion for a preliminary injunction, filed on May 3, 1990, once again requests this Court to enjoin Defendants from (i) going forward with the HSCR 13 proceeding which arose out of ***State v. Clarke,*** and (ii) requiring Partington to respond to inquiries arising out of an investigation being conducted by the Office of Disciplinary Counsel of the Supreme Court of Hawaii (ODC 1467) pursuant to HSCR Rule 2.[2]

Partington's Rule 13 proceeding had already taken place prior to this Court hearing his motion for a preliminary injunction on August 27, 1990. Accordingly, there existing no case or controversy, Partington's motion for a preliminary injunction as to the Rule 13 proceeding must be denied as all issues relevant thereto are now moot.

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[2] At this time there are actually two Rule 2 investigatory proceedings involving Partington's conduct in ***State v. Clarke.*** A Rule 2.7(a) "Investigation" was commenced following a complaint filed by the trial judge in ***State v. Clarke*** accusing Partington of misconduct in his representation of Clarke in that Partington, **inter alia**, refused to make a closing argument at Clarke's trial. In addition, a second, but closely interwoven, Rule 2 investigation has arisen out of the decision by the Special Master in Partington's Rule 13 proceeding for rendering ineffective assistance of counsel in ***State v. Clarke.*** Under Rule 13, where the master finds, as Joseph Gedan has in the instant case, that ineffective assistance of counsel may have resulted from a violation of DR 6-101 or DR 7-101, the master "shall," in addition to requiring the attorney to take a course in remedial education and/or temporarily suspending the attorney's license, refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2.

Moreover, both of Partington's requests for injunctive relief must be denied for the threshold reason that this Court lacks subject matter jurisdiction to reconsider matters that have been previously decided by this Court in its July 6, 1987 Order Granting Defendants' Motion to Dismiss – that Order having been affirmed by the Ninth Circuit.

This Court's invocation of *Younger*-abstention[3] relative to the precise matters raised in Partington's instant request for injunctive relief was affirmed by the Ninth Circuit in ***Partington v. Gedan,*** 880 F.2d 116 (9th Cir. 1989). Moreover, the Ninth Circuit, on May 11, 1990, denied Partington's motion to recall its mandate in ***Partington v. Gedan.***

Both the Supreme Court of the United States and the Ninth Circuit have held that a United States District Court is without jurisdiction to grant the relief requested by Partington or in any manner to review or attempt to alter the Ninth Circuit's affirmation of this Court's invocation of *Younger* abstention.

> The Supreme Court long ago emphasized that when acting under an appellate court's mandate, an inferior court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded." ***Matter of Beverly Hills Bancorp,*** 752 F.2d 1334, 1337 (9th Cir. 1984), **citing,** ***In re***

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[3] ***Younger v. Harris,*** 401 U.S. 37 (1971).

Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895).

See also, *Mullis v. U.S. Bankruptcy Court. Dist. of Nevada*, 828 F.2d 1385, 1393 (9th Cir. 1987).

> Needless to say, a district court has no such authority to "review" any ruling of a court of appeals. *Mullis*, 828 F.2d at 1393 n.19, citing, *Insurance Group Comm. v. Denver & R.G.W.R.R.*, 329 u.s. 607, 612 (1947) ("When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus, a cause proceeds to final determination.")

Partington v. Gedan was remanded to this Court for the limited purpose of determining the amount of sanctions to be awarded to Partington pursuant to the Ninth Circuit's instructions in that decision. This Court having fulfilled its responsibilities under the limited remand is now without jurisdiction to "intermeddle" any further with the decision in that case.

Partington argues, nevertheless, that *Partington v. Gedan* is not controlling in the instant case. He argues, in essence, that "that was then and this is now." It is not clear to this Court, however, how the mere passage of time has undermined the decision in *Partington v. Gedan*. If anything, that decision has been bolstered by subsequent proceedings in the Hawaii Supreme Court. All four justices of the Supreme Court of Hawaii who decided *State v. Clarke* recused themselves from review of Partington's disciplinary proceedings. Thus, the concerns of dissenting Judge Reinhardt in *Partington v. Gedan* regarding the possibility of judicial bias have been

eliminated and this Court's invocation of *Younger* abstention is appropriate ***a fortiori.***

Further, the review of those proceedings by the impartial Hawaii Supreme Court shows that Partington is afforded a full opportunity to advance his arguments in the Rule 13 proceedings. In an order dated September 24, 1990 in ***State v. Clarke,*** (Cr. No. 59285, Haw. Sup. Ct.), the Hawaii Supreme Court rejected Partington's argument that the Rule 13 proceedings against him were unconstitutional. The Court found, however, that the Rule 13 Special Master exceeded the scope of his authority by considering and ruling *de novo* upon the issue of whether Partington rendered ineffective assistance of counsel. The Court held that issue received final adjudication in ***State v. Clark*** [sic] and that it could not be relitigated under a Rule 13 proceeding.

A subsequent order clarified the September 24, 1990 order. In an order dated October 11, 1990, the Hawaii Supreme Court held that, while a Rule 13 prosecutor does not have the power to reopen the final judicial determination that a defendant received ineffective assistance of counsel, Rule 13 does afford the respondent attorney an opportunity to put on all evidence relevant to whether or not corrective action should be present. The attorney may present, or re-present, evidence regarding the surrounding circumstances and his or her strategic reasons for the actions that resulted in the finding of ineffective assistance of counsel. The Court stated, "[the] finding of ineffective assistance, although itself conclusive, does not bar the Special Master from weighing with an open mind such surrounding circumstances and strategic reasons . . . for the limited purpose of determining under

Rule 13 whether or not corrective action should be recommended against the respondent attorney." ***State v. Clarke,*** (CR. NO. 59285, Haw. Sup. Ct., Oct. 11, 1990).

Thus, the Rule 13 Special Master's findings cannot affect the criminal defendant's rights by suggesting the ineffectiveness finding be reversed. However, the Special Master's findings can address any issues regarding Partington's conduct and insure that they are reflected in any disciplinary measures. As the concurring opinion in ***Partington v. Gedan*** states:

> [t]here would be no *logical* inconsistency between the [Hawaii] Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer. The question of [Clarke's] sixth amendment deprivation is logically distinct from the disciplinary standards which Partington must meet to satisfy the Bar.

880 F.2d at 134 (J. Noonan, concurring).

The Court is unconvinced, therefore, by Partington's argument that the decisions by this Court and the Ninth Circuit in ***Partington v. Gedan*** are not controlling in the instant matter. Merely changing some of the names of the parties fails to camouflage Partington's unabashed attempt to relitigate matters which have reached a final determination in the federal system. Having been decided in this Court, affirmed by the Ninth Circuit, and the Supreme Court of the United States having denied

Partington's petition for a writ of certiorari, the instant matters have been adjudicated.

Moreover, if, in reviewing Mr. Partington's shotgun approach to his Second Amended Complaint, this Court has inadvertently overlooked some iota that was not explicitly reached in the Court's previous decision and the Ninth Circuit's affirmation of that decision, the Court once again invokes ***Younger*** abstention as to any such issue that may have survived the earlier Order.

Even if Partington were to have raised new issues that were not explicitly decided in ***Partington v. Gedan,*** which this Court is convinced he has not, his motion for a preliminary injunction would nevertheless be denied because he has failed to demonstrate likelihood of success on the merits. In all likelihood this Court would again invoke ***Younger*** abstention because Partington has failed to establish (i) that without federal intervention he would not have the opportunity for adequate vindication of Constitutional rights in state court, or (ii) that state court proceedings have been pursued in bad faith or some other extraordinary circumstance that would make abstention inappropriate. ***Partington v. Gedan,*** 880 F.2d at 128; ***Bishop v. State Bar of Texas,*** 736 F.2d 292 (5th Cir. 1984). In this case it is evident there was no bad faith and the Defendants had probable cause in view of Partington's failure to make any final argument in ***State v. Clarke.***

The basic function of a preliminary injunction is to preserve the status quo pending a determination of the underlying action on the merits. ***Los Angeles Memorial***

Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

In order to obtain a preliminary injunction, however, Partington must demonstrate either (i) a combination of probable success on the merits and the possibility of irreparable injury, or (ii) that serious questions are raised and the balance of hardships tips sharply in his favor. *Chalk v. U.S. Dist. Court Cent. Dist. of California,* 840 F.2d 701, 704 (9th Cir. 1988).

These are not separate tests, but "the outer reaches 'of a single continuum.' " Id. There must be some showing of likelihood of success on the merits "[n]o chance of success at all, however, will not suffice." *Benda v. Grand Lodge of Intern. Ass'n Etc.,* 584 F.2d 308, 315 (9th Cir. 1978). According to the *Benda* panel,

> The irreducible minimum has been described by one court as a fair chance of success on the merits, while another has said the questions must be serious enough to require litigation. The difference between the two formulations is insignificant. Therefore, we accept either as satisfactory. *Benda,* 584 F.2d at 315 (cites omitted).

Partington has failed to meet this irreducible minimum. He claims that he is foreclosed from disclosing confidential attorney-client communications in response to interrogatories from the Office of Disciplinary Counsel of the Supreme Court of Hawaii. In so claiming, he has ignored the clearly delineated self-defense exception to the attorney-client privilege cited by the Ninth Circuit in *Partington v. Gedan,* 880 F.2d at 116. Disciplinary Rule 4-101(C)(4) provides:

A lawyer may reveal:

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Thus, to the extent that any of Partington's contentions survive mootness, ***res judicata,*** and jurisdictional prohibitions, his motion for a preliminary injunction is denied for failure to demonstrate some modicum of likelihood of success on the merits.

Motion to Dismiss

Partington's Complaint consists of ten separate substantive claims for relief. Claims enumerated 1, 4, 5, 8, and 9 are duplicative of the claims in ***Partington v. Gedan*** which were dismissed by this Court and affirmed by the Ninth Circuit. As discussed above, this Court lacks subject-matter jurisdiction to reconsider these adjudicated claims. Claims enumerated 1, 4, 5, 8, and 9 are therefore dismissed for lack of subject-matter jurisdiction. And as to any issues in these claims that were not explicitly decided in ***Partington v. Gedan,*** this Court invokes ***Younger*** abstention.

Partington has made other allegations and claims for relief, however, which arguably were not decided in ***Partington v. Gedan.***

Claims 3, 6, and 10

Claims 3, 6, and 10, respectively, request (i) a declaratory judgment that Justice Padgett of the Supreme Court

of Hawaii, violated Partington's Constitutional rights by accusing him of rendering ineffective assistance of counsel in *State v. Denton,* (ii) a declaratory judgment that Partington's future behavior in criminal cases, if in line with his past behavior, will prospectively be deemed lawful and ethical, i.e., that if he conducts himself in the future as he did in *State v. Clarke, State v. Lau,* and *State v. Denton,* that "it must be presumed that he is lawfully and ethically fulfilling his duty under the Sixth and Fourteenth Amendments to provide effective assistance of counsel," and (iii) an injunction permanently enjoining the Supreme Court of Hawaii from accusing or sanctioning him of any misconduct or professional negligence, without prior notice and an opportunity to be heard.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

Even though the express terms of the Amendment do not so provide, the Supreme Court long ago held that the Eleventh Amendment barred a citizen from bringing suit against his own State in federal court. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 (1985), citing, *Hans v. Louisiana,* 134 U.S. 1 (1890). The principal exception to this general rule of immunity lies where a state demonstrates an unequivocal decision to waive Constitutional immunity in a delineated area. Partington does not even

argue that the State of Hawaii has unequivocally provided that its citizens may sue its Supreme Court for the reasons complained of by Partington.

Moreover, it is well-established law that the individual judges of the Hawaii Supreme Court are entitled to absolute immunity from a suit for damages.

> Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities. ***Ashelman v. Pope,*** 793 F.2d 1072, 1075 (9th Cir. 1986), citing, ***Richardson v. Koshiba,*** 693 F.2d 911, 913 (9th Cir. 1982).

The foregoing notwithstanding, it is a long-established rule that judicial "[i]mmunity does not extend, however, to actions for prospective injunctive relief." ***Id.,*** **citing,** ***Pulliam v. Allen,*** 466 U.S. 522, 541-42 (1984); **see also,** ***Richardson,*** 693 F.2d at 913 n. 8. (Judicial immunity does not extend to suits for injunctive relief."); ***Shipp v. Todd,*** 568 F.2d 133, 134 (9th Cir. 1978).

In particular, the absence of judicial immunity for prospective injunctive relief has long been recognized in the area of judicial actions potentially violative of Civil Rights guarantees. **See, e.g.,** ***Pulliam,*** 466 U.S. at 540, **citing,** ***Ex parte Virginia,*** 100 U.S. 339 (1880) ("[I]nterpretations of the Civil Rights Acts by the Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges.")

In ***Mitchum v. Foster,*** 407 U.S. 225, 240 (1972), the Supreme Court of the United States found Title 42 U.S.C. § 1983 to be an explicit exception to the anti-injunction

statute. The Court cited ***Ex parte Virginia*** for the proposition that the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " *Mitchum,* 407 U.S. at 242.

This doctrine of nonimmunity was again upheld by the Supreme Court in ***Pulliam***:

> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. *Pulliam,* 466 U.S. at 541.

It follows that this Court does have authority to enjoin a state supreme court justice from activities that are Constitutionally repugnant. In accordance with ***Mitchum*** and ***Pulliam,*** this Court recognizes its duty to ensure that Constitutional rights are not abrogated by the actions of state judges.

However, it is well-settled that review of orders of a state supreme court relating to discipline of members of its bar has been explicitly reserved to the Supreme Court of the United States.

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original

> action in a lower federal court. ***MacKay v. Nesbett,*** 412 F.2d 846, 846 (9th Cir. 1969) (per curiam), **cert. denied,** 396 U.S. 960 (1969), **relying upon,** ***Theard v. United States,*** 354 U.S. 278, 281 (1957); **see also,** ***Miller v. Washington State Bar Assoc.,*** 679 F.2d 1313, 1315, **rehearing denied,** 691 F.2d 430 (9th Cir. 1982), **citing** ***MacKay v. Nesbett*** **with approval.**

Based upon the Second Amended Complaint, the memoranda filed in this action, as well as oral argument before this Court, Partington's Claims 3, 6, and 10 are construed by this Court to amount to nothing other than a request for review of disciplinary orders of a state supreme court. As such, this Court lacks jurisdiction to review such orders and Defendants' motion to dismiss must be granted as to these claims.

Moreover, Plaintiff is without standing to seek such prospective relief. Plaintiff seeks declaratory relief asking, in essence, that this Court rule that Plaintiffs' conduct in future trials, to the extent it is similar to his conduct currently under review, be declared ethical and competent, and not subject to disciplinary action by Defendants. To maintain standing under Article III the Supreme Court set forth three requirements which must be met:

> (1) the party "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,"
>
> (2) the injury "fairly can be traced to the challenged action," and
>
> (3) the injury "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church and State. Inc., 454 U.S. 464, 472 (1982).

In this case, Plaintiff has not suffered any actual or threatened injury concerning any future conduct. First, there are no other proceedings instituted against Plaintiff by Defendants of which this Court is aware. *See Juidice v. Vail*, 430 U.S. 327, 333 (1977) (plaintiffs not threatened with further or repeated proceedings have no standing to seek injunctive relief). Thus, Plaintiff has suffered no actual or threatened injury. Accordingly, Plaintiff does not have standing to seek relief concerning his future conduct.

Plaintiff also requests injunctive relief against the Hawaii Supreme Court requiring that tribunal to provide prior notice and an opportunity to be heard to him and others who face disciplinary action. This Court notes that Plaintiff was given notice and a hearing consonant with due process in the proceedings currently pending before the Hawaii Supreme Court. There is no reason to believe that the Hawaii Supreme Court will not provide these fundamental due process considerations to all persons subject to disciplinary proceedings. Moreover, Plaintiff again lacks standing to pursue this claim. Plaintiff's injunctive request is little more than a request for the Hawaii Supreme Court to comply with the rights of due process in the future. *See Foster v. Center Township of LaPorte County*, 798 F.2d 237, 243 (7th Cir. 1986) (no standing where plaintiff's claim "[d]istilled to its constitutionally relevant premise, . . . rests on no more than a general interest in insisting that government officials comply with statutory or constitutional obligations.").

Even if the Hawaii Supreme Court previously denied Plaintiff his due process rights this alone would not entitle Plaintiff to injunctive relief. *See* ***City of Los Angeles v. Lyons,*** 461 U.S 95 (1983) (no case or controversy where standing to seek injunction depended on whether Plaintiff was likely to suffer future injury from the use of chokeholds by police officers and such injury unlikely); and ***Golden v. Zwickler,*** 394 U.S. 103 (1969) (no standing for declaratory judgment where "most unlikely" that Plaintiff would again be subject to statute prohibiting anonymous handbills directly pertaining to election campaigns); *see also* 13A Wright & Miller, *Federal Practice and Procedure,* § 3531.12 (1984). Plaintiff's request is no more than a generalized grievance which may be shared by other residents of this state. Such an intangible basis is insufficient to confer standing on Plaintiff. Thus, Plaintiff has not demonstrated that he has standing to enjoin the Hawaii Supreme Court in the manner he seeks.

Finally, even if this Court were to review Partington's claims on the merits, contrary to the requirements of Rule 8(a) Fed.R.Civ.P., he has failed to set forth a plain statement of a claim showing that he is entitled to relief. In short, Partington's allegations do not present a cognizable claim. A state supreme court justice's accusation that a member of his state bar has rendered ineffective assistance of counsel surely does not rise to the level of a violation of any recognized Constitutional right, privilege, or protection.

Claims 2 and 7

Claim 2 challenges the propriety of a $50.00 fine levied against Partington in *State v. Lau* for failure to follow a procedural rule. Claim 7 asks that this Court Order Jeremy Harrison to pay $50.00 to Earle Partington from the Dean's Discretionary Fund of the William S. Richardson School of Law, University of Hawaii.

These Claims must also be dismissed because the United States Supreme Court has exclusive jurisdiction over issues regarding the propriety of a fine imposed upon an attorney by a state supreme court for violation of its procedural rules. *Younger* abstention applies in such circumstances and the district court is without jurisdiction.

It is well-settled that "[t]he United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings." *MacKay v. Pfeil,* 827 F.2d 540, 545 (9th Cir. 1987), quoting, *Worldwide Church of God v. McNair,* 805 F.2d 888, 890 (9th Cir. 1986).

Notwithstanding, the Supreme Court has recognized a distinction between a state court "judicial proceeding" and a state court's imposition of a fine under its rulemaking authority. The district court has no authority to consider the propriety of the former, but does, under limited circumstances, have jurisdiction over the latter.

In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), the Supreme Court of the United States held that a district court has authority to consider

the propriety of a state bar admission rule and distinguished such rules from judicial decisions by state courts which are not reviewable in a federal district court.

> Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding. * * * In this regard, 28 U.S.C. 1257 does not act as a bar to the district court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States district court review of final state-court judgments are not implicated. **United states district courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules,** promulgated by state courts in nonjudicial proceedings, which do not require a review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. ***Feldman,*** 460 U.S. at 486 (emphasis added).

In the instant case, however, Partington's Claims numbered 2 and 7 are not general challenges to a state procedural rule promulgated in a nonjudicial proceeding. Partington has not claimed that the procedural rule itself is unconstitutional. Rather, Partington's is a challenge to a state court decision in a particular case arising out of a judicial proceeding. Under ***Feldman,*** therefore, this Court has no jurisdiction to reconsider application of a state procedural rule to Partington.

In *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), **vacated on other grounds,** 106 S.Ct. 3269 (1986), the Ninth Circuit held that where there has already been a decision in a state court on a given issue, action in federal court is an impermissible "appeal" from the state court decision. But because the state court in *Robinson* had refused to consider the plaintiff's Constitutional claims, the Ninth Circuit held that the district court, in considering those claims, was not acting in an appellate capacity and did have subject-matter jurisdiction. *Robinson*, 763 F.2d at 1473, **cited with approval in,** *MacKay*, 827 F.2d at 545. Partington, however, has failed to demonstrate that the Supreme Court of Hawaii has refused to consider the constitutionality of its rules. The Hawaii Supreme Court has held that the Rule 13 proceedings against Partington do not violate his constitutional rights and that Rule 13 is not unconstitutional on its face. *State v. Clarke,* (CR. NO. 59285, Haw. Sup. Ct., Sept. 24, 1990). Further, the Court held that Partington is free to introduce any and all evidence at the Rule 13 proceedings regarding the reasons for his conduct in representing his client. *State v. Clarke,* (CR. NO. 59285, Haw. Sup. Ct., Oct. 11, 1990).

Finally, even if federal jurisdiction were not barred by the *Feldman* doctrine, it would be barred by the Eleventh Amendment. The Eleventh Amendment bars suits against state officials in their official capacity when the relief sought is retrospective in nature. A suit for damages, of course, is a suit for retrospective relief. **See, e.g.,** *Ulaleo v. Paty,* No. 89-16130, slip op. at 4369, 4374 (9th Cir. May 4, 1990), **citing,** *Green v. Mansour,* 474 U.S. 64 (1985); *Kentucky v. Graham,* 473 U.S. 159 (1985); *Edelman*

v. Jordan, 415 U.S. 651 (1974); *Blaylock v. Schwinden,* 862 F.2d 1352.

Partington has requested that this Court order a State of Hawaii official to pay to him the sum of $50.00 in recompense for the fine imposed upon him by the Supreme Court of Hawaii in *State v. Lau.* Under *Ulaleo,* Partington's requested retroactive relief is barred by the Eleventh Amendment and this Court has no jurisdiction to consider his action.

Thus, whether under *Feldman* or under the *Green v. Mansour* line of cases, this Court is without jurisdiction to consider the propriety of the $50.00 fine imposed upon Partington. Claims 2 and 7 must be dismissed.

CONCLUSION

In accordance with the foregoing, and in the interests of justice, Earle Partington's Motion for a Preliminary injunction is hereby **DENIED** and Defendants' Motion to Dismiss Partington's Second Amended Complaint is **GRANTED in toto**. Partington's Second Amended Complaint and the underlying action are hereby **DISMISSED.**

IT IS SO ORDERED.

DATED: Honolulu, Hawaii DEC 17 1990

/s/ Alan C. Kay
United States District Court

LAU v. LUM: CIVIL NO. 89-00400 ACK: ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING MOTION TO DISMISS

Earle A. PARTINGTON,
Plaintiff-Appellant,

v.

Joseph M. GEDAN; Howard T. Chang,
Defendants-Appellees.

No. 87-2375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1988.

Decided March 13, 1989.

Motion to Correct Opinion Granted in
Part and Denied in Part
April 6, 1989.

As Amended April 6, 1989.

As Amended on Denial of Reconsideration
July 12, 1989.

Attorney who was made subject of disciplinary proceedings following reversal of client's conviction for ineffective assistance of counsel brought civil rights action against special master and special prosecutor. The United States District Court for the District of Hawaii, Alan Cooke Kay, J., held that abstention under *Younger* was appropriate, and attorney appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court properly abstained from hearing attorney's constitutional challenges to enforcement of Hawaii Supreme Court Rule against him, but (2) attorney's arguments against abstention were not so frivolous as to warrant award of costs and attorney fees under Federal Rule of Appellate Procedure.

Affirmed.

Noonan, Circuit Judge, concurred and filed opinion.

Reinhardt, Circuit Judge, concurred in part and dissented in part and filed opinion.

Earle A. Partington, Honolulu, Hawaii, for plaintiff-appellant.

Susan L. Gochros, Deputy Atty. Gen., Honolulu, Hawaii, for defendants-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before WALLACE, REINHARDT and NOONAN, Circuit Judges.

WALLACE, Circuit Judge:

Attorney Partington filed suit pursuant to 42 U.S.C. § 1983 in the United States District Court, alleging that enforcement of Hawaii Supreme Court Rule 13 against him violated the first, fifth, sixth, and fourteenth amendments to the United States Constitution. He sought a declaratory judgment stating that Rule 13 violated these constitutional provisions and an injunction barring any further proceedings against him pursuant to Rule 13. The district court concluded that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (*Younger*), was appropriate because Partington could raise these constitutional challenges in the ongoing Rule 13 proceedings. We have jurisdiction and affirm.

I

The Hawaii trial court appointed Partington as trial counsel for Clarke. The State had charged Clarke with brutally murdering the three-year-old daughter of his live-in girlfriend. Partington represented Clarke at trial. Clarke was convicted of murder and sentenced to life in prison.

Partington's appointment as counsel for Clarke continued on appeal. Clarke raised numerous contentions, but did not allege ineffective assistance of trial counsel. During the pendency of the appeal, however, the state trial judge who presided at Clarke's trial complained to the Office of Disciplinary Counsel of the Hawaii Supreme Court about Partington's failure to make a closing argument at Clarke's trial. Following this complaint, Partington filed a motion with the Hawaii Supreme Court, on behalf of Clarke, requesting that the Supreme Court remand the appeal to the trial court to explore the trial judge's complaint. The motion was denied.

During oral argument before the Hawaii Supreme Court on Clarke's criminal appeal, some Justices *sua sponte* raised the issue of ineffective assistance of trial counsel. The Hawaii Supreme Court subsequently reversed Clarke's conviction. Without addressing the numerous arguments made in Clarke's brief, the court declared that Partington rendered ineffective assistance during trial. The court based this conclusion on the following: (1) Partington refused to make an opening statement; (2) he refused to cross-examine the mother of the victim ostensibly because the State did not make certain records concerning the witness available to him; (3) he

subsequently refused to call the mother after receiving the records; (4) he elicited testimony from two State witnesses that they believed Clarke was guilty; and (5) he refused to make a closing argument. The Hawaii Supreme Court's opinion concluded: "We remind both counsel of their obligations under [Hawaii Supreme Court Rule] 13 once a judgment on appeal has been issued by us in this case."

Hawaii Supreme Court Rule 13[1] outlines proceedings that are to be brought against defense counsel following

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[1] Haw.St.Ct.R. 13 provides:

PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

> Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.
>
> Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

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the adjudication of his or her ineffective assistance in criminal cases. Under Rule 13, the Hawaii Supreme Court

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Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he shall file with his return a motion therefore supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent himself. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the

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appoints a special master "to determine whether action against the counsel alleged to have been incompetent is

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appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with.

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR 6-101 to DR 7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

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warranted." Haw.Sup.Ct.R. 13. Within five days of this appointment, the special master notifies the defense counsel by mail. Within forty-five days of this mailing, the defense counsel must "file with the clerk of the supreme court an answer showing cause why corrective action as provided [in the Rule] should not be taken by the supreme court." *Id.* Within five days of receiving the defense attorney's answer, the special master must appoint an attorney to prosecute the proceedings. *Id.* The defense attorney and the special prosecutor then have forty-five days to conduct discovery. Within thirty days after the expiration of the discovery period, the special master holds a hearing. Within ten days after the conclusion of the hearing, the special master must render a decision and enter "an order either dismissing the proceedings or recommending corrective action against the respondent attorney." *Id.* Within twenty days of the special master's decision and proposed order, the defense attorney and the special prosecutor may file exceptions with the Hawaii Supreme Court. Within forty days of the

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Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

special master's decision and proposed order, the Supreme Court must "enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth" in the Rule. *Id.*

In accordance with Rule 13, on February 3, 1986, the Hawaii Supreme Court appointed Gedan as the special master. On February 7, 1986, Gedan notified Partington that he had forty-five days to submit an answer "showing cause why corrective action as provided for in Rule 13 should not be taken by the Supreme Court." On March 27, 1986, Partington filed an answer in accordance with the Rule. Without waiving any constitutional challenges, Partington's answer stated that he based all of his trial decisions on certain tactics, but that he could not explain his tactical choices because his client at trial, Clarke, refused to waive the attorney-client privilege.

Gedan did not appoint a special prosecutor within five days of receiving the answer as provided in Rule 13; however, on August 13, 1986, Gedan appointed Chang as the special prosecutor. Notwithstanding the time schedule set forth in Rule 13, the record does not reflect that the parties engaged in discovery during the forty-five day period as provided in the Rule or that the special master set the matter for a hearing within thirty days of the close of the discovery period.

On March 9, 1987, Partington filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Hawaii, naming Gedan and Chang as defendants. He alleged that the conduct of Gedan and Chang pursuant to Rule 13 deprived and continue to deprive him of rights under the free speech clause of the first

amendment, the due process clause of the fifth and fourteenth amendments, the right to counsel clause of the sixth amendment, and the equal protection clause of the fourteenth amendment. The complaint sought (1) an injunction prohibiting Gedan and Chang from proceeding against Partington pursuant to Rule 13, (2) a declaratory judgment that Rule 13 as applied to Partington is unconstitutional, and (3) attorney's fees, costs, and expenses for the action. Partington also sought damages for attorney's fees and costs arising out of the Rule 13 proceeding, but later abandoned this claim. On March 30, 1987, Gedan and Chang moved to dismiss the complaint, arguing the the district court should abstain. They asserted that Partington could raise all of his constitutional claims in the Rule 13 hearing, which was scheduled to commence on April 14, 1987. The Rule 13 hearing was not held that day because Gedan stayed the hearing on Partington's request. On April 22, Partington filed a motion for summary judgment. On May 12, the Hawaii Association of Criminal Defense Lawyers (Defense Lawyers) lodged a brief in the district court on behalf of Partington as amicus curiae.

On July 1, 1987, the district court granted the Defense Lawyers' motion to file the amicus brief, granted the motion of Gedan and Chang to dismiss the complaint, and denied Partington's motion for summary judgment. The district court concluded that *Younger* abstention, as interpreted and applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (*Middlesex*), should be applied. After the district court entered its judgment,

Partington filed a timely notice of appeal, challenging the dismissal of the complaint.

II

Ordinarily, the dismissal of a complaint without the dismissal of the underlying action is not considered an appealable final order under 28 U.S.C. § 1291. *See Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir.1984); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984) (*Hoohuli*). Here, the district judge abstained, but maintained jurisdiction over the cause by virtue of his failure to dismiss the underlying action. This procedure, if allowed, would grant the state permission to proceed first but allow the parties to maintain a federal court presence, if needed, after the state has finalized its assessment of the issues presented. *See Crane v. Fauver*, 762 F.2d 325, 328-29 (3d Cir.1985). We have jurisdiction over this interlocutory appeal, however, because of the denial of Partington's request for an injunction preventing Gedan and Chang from proceeding against him pursuant to Rule 13. *See* 28 U.S.C. § 1292(a)(1); *Sea Ranch Association v. California Coastal Zone Conservation Commission*, 537 F.2d 1058, 1061 (9th Cir.1976).

There is another reason why we may accept jurisdiction over this appeal. We have held that where *Younger* abstention is applicable, "a district court must dismiss the action." *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir.1987) *(World Famous Drinking Emporium), quoting Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1356 (9th Cir.1986). Because the district judge was required to

dismiss the action, we may assume he intended to do so and treat the dismissal of the complaint as a dismissal of the action. *See Hoohuli*, 741 F.2d at 1171 n. 1.

That brings us to our standard of review. When the district court, pursuant to the authority of *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), abstains from addressing the constitutionality of a state statute because state court proceedings interpreting the statute are still pending, we review its abstention for an abuse of discretion. *C-Y Development Co. v. Redlands*, 703 F.2d 375, 377 (9th Cir.1983). But when, as here, the district court abstains on the basis of *Younger*, which forbids federal courts from enjoining pending certain categories of state proceedings except in extraordinary circumstances, we review its abstention de novo. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 468 (9th Cir.1984) (*Goldie's Bookstore*). This de novo review is applied even though we are reviewing the action of the district court in granting or denying an injunction. *See id.*

III

Although abstention is the exception, not the rule, *see World Famous Drinking Emporium*, 820 F.2d at 1082, *Younger* and its companion cases generally require a federal district court to abstain from granting injunctive relief when state criminal actions or certain categories of state civil or administrative proceedings are pending against the federal plaintiff at the time he or she commences the federal action. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 1522, 95 L.Ed.2d 1 (1987) (*Pennzoil*) (injunctive relief against a prevailing civil litigant

attempting to execute a judgment in its favor pending appeal of that judgment to a state appellate court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512 (1986) (*Dayton Schools*) (injunctive relief against administrative proceedings conducted by state civil rights commission); *Middlesex*, 457 U.S. at 428-29, 102 S.Ct. at 2519 (injunctive relief against state bar disciplinary proceedings); *Moore v. Sims*, 442 U.S. 415, 423, 433-35, 99 S.Ct. 2371, 2377, 2382-83, 60 L.Ed.2d 994 (1979) (*Moore*) (injunctive relief against state proceeding seeking to protect allegedly abused children); *Trainor v. Hernandez*, 431 U.S. 434, 435-38, 97 S.Ct. 1911, 1913-15, 52 L.Ed.2d 486 (1977) (*Trainor*) (injunctive relief against a state civil attachment/enforcement proceedings); *Juidice v. Vail*, 430 U.S. 327, 333-36, 97 S.Ct. 1211, 1216-17, 51 L.Ed.2d 376 (1977) (*Juidice*) (injunctive relief against state contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-07, 95 S.Ct. 1200, 1207-09, 43 L.Ed.2d 482 (1975) (*Huffman*) (injunctive relief against state civil proceedings seeking abatement of a nuisance); *Younger*, 401 U.S. at 49-53, 91 S.Ct. at 753-755 (injunctive relief against state criminal proceedings). The *Younger* abstention doctrine is based on considerations of equity, comity, and federalism. *See, e.g., Pennzoil*, 107 S.Ct. at 1525-26; *Younger*, 401 U.S. at 43-45, 91 S.Ct. at 750-51.

A.

In applying the *Younger* doctrine, federal courts must examine (1) the nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal

relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings. *See Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521; *World Famous Drinking Emporium*, 820 F.2d at 1081, 1082. Courts must also examine whether the proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate." *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. But where a state tribunal has been found incompetent by reason of bias, the Supreme Court has held that there was effectively no opportunity to litigate constitutional claims. *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973) (*Gibson*); *compare Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975) (dictum agreeing that a biased state tribunal removes predicate for *Younger v. Harris* dismissal, but categorizing biased tribunal in *Gibson* as example of "extraordinary circumstance" rendering state tribunal incapable of fairly and fully adjudicating issues before it).

1.

Younger by its own terms requires federal courts to abstain from interfering in state criminal proceedings absent exceptional circumstances. *See* 401 U.S. at 53-54, 91 S.Ct. at 754-55. The Supreme Court, however, has never held that federal district courts should always abstain under *Younger* when state civil proceedings are pending. *See Moore*, 442 U.S. at 423 n. 8, 99 S.Ct. at 2377 n. 8; *Huffman*, 420 U.S. at 607, 95 S.Ct. at 1209. Nonetheless, the Court has held that, under *Younger*, federal courts should

abstain from interfering with state disciplinary proceedings analogous to the Rule 13 proceeding currently pending against Partington. *See Middlesex*, 457 U.S. 423, 102 S.Ct. 2515. In *Middlesex*, the Middlesex County Ethics Committee, a tribunal under the jurisdiction of the New Jersey Supreme Court, charged Hinds, a member of the New Jersey Bar, with violating two New Jersey disciplinary rules. *Id.* at 425-28, 102 S.Ct. at 2518-19. Rather than filing an answer to the charges as provided in the New Jersey Bar disciplinary procedures, Hinds filed suit in federal district court, alleging that the disciplinary rules violated his first amendment rights and were facially vague and overbroad. *Id.* at 429, 102 S.Ct. at 2519. The district court abstained under *Younger*, but was reversed by the Third Circuit. *Id.* at 429, 102 S.Ct. at 2519.

Recognizing that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved," the Supreme Court proceeded to review the New Jersey State Bar disciplinary proceedings in light of the three requirements for abstention under *Younger*. *Id.* at 432, 102 S.Ct. at 2521. First, observing that the local Ethics Committees acted as an arm of the New Jersey Supreme Court, the Court determined that "[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee." *Id.* at 433-34, 102 S.Ct. at 2522. Significant to the Court's determination that the state disciplinary proceedings were "judicial" in nature was its analogizing of the role local ethics or bar associations to that of a special master. *Id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13. Next, the Court acknowledged that the state "has an *extremely important*

interest in maintaining and assuring the professional conduct of the attorneys it licenses," especially "the professional conduct of attorneys involved in the administration of *criminal* justice." *Id.* at 434, 102 S.Ct. at 2522 (emphasis added). Last, the Court opined that because Hinds "failed even to *attempt* to raise any federal constitutional challenge in the state proceedings," he had not shown that "the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees." *Id.* at 435, 102 S.Ct. at 2522 (emphasis in original). Having concluded that the three prerequisites for *Younger* abstention were satisfied, the Court reversed the Third Circuit, holding that it was proper for the district court to have stayed its hand in this case. *See id.* at 437, 102 S.Ct. at 2524.

The Rule 13 disciplinary proceeding initiated against Partington in Hawaii is strikingly similar to the New Jersey disciplinary proceedings at issue in *Middlesex*. Both proceedings are conducted by an ethics committee or its analogue, a special master, *id.* at 434 n. 13, 102 S.Ct. at 2522 n. 13, under the auspices of the state supreme court. *Compare* 457 U.S. at 425-27, 433, 102 S.Ct. at 2518-19, 2522 *with* Haw.S.Ct.R. 13. Just as the Court in *Middlesex* concluded that the State of New Jersey had a "special" interest "in the professional conduct of attorneys involved in the administration of criminal justice," 457 U.S. at 434, 102 S.Ct. at 2522, we conclude that Hawaii has a vital interest in ensuring that defense counsel in criminal cases perform within the standards of reasonable professional competence. Partington concedes, as he must, that the State of Hawaii has a very important interest

in its Rule 13 proceedings. Thus, the first requirement for *Younger* abstention has been met. In addition, there is no question that the Rule 13 proceedings had begun and were still pending at the time Partington filed suit in the district court. Partington concedes this point as well. Thus, the second requirement for *Younger* abstention has been met. Unless Partington can show that, unlike the New Jersey state disciplinary proceedings discussed in *Middlesex*, the Rule 13 proceedings against him do not offer him an opportunity to raise his constitutional claims and have them timely decided by a competent state tribunal, *see Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524; *Gibson*, 411 U.S. at 573-74, 93 S.Ct. at 1695, or that this proceeding demonstrates "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," *Middlesex*, 457 U.S. at 435, 437, 102 S.Ct. at 2522, 2524, *Middlesex* governs and we must, accordingly, affirm the dismissal of this action under *Younger*.

2.

Under the third prong of the test for *Younger* abstention, federal abstention is inappropriate unless the plaintiff is afforded the opportunity in the ongoing state proceedings to raise his constitutional claims "and have [those claims] timely decided by a competent state tribunal." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697; *accord Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Partington strenuously advances two grounds why the Rule 13 proceedings against him fail to meet this third required predicate for *Younger* abstention.

First, he maintains that the attorney-client privilege procedurally bars him from disputing the Hawaii Supreme Court's finding of ineffectiveness of counsel, thereby depriving him of an opportunity to raise his federal constitutional claims during his Rule 13 proceedings. If a federal plaintiff cannot raise his federal claim in the state proceedings because state procedures do not afford him the opportunity to do so, then abstention is not appropriate. *See, e.g., Gerstein v. Pugh,* 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 860 n. 9, 43 L.Ed.2d 54 (1975). Partington argues that abstention is inappropriate here because Clarke's refusal to waive the attorney-client privilege disables him from contesting the ineffectiveness of counsel issue in either the Rule 13 proceedings or in the Hawaii Supreme Court. Partington believes that the "self-defense" exception to the attorney-client privilege, *see* Disciplinary Rule 4-101(c)(4),[2] only applies when the

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[2] Disciplinary Rules, DR 4-101, *Preservation of Confidences and Secrets of a Client,* provides:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

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client questions the attorney's conduct. Clarke has not done so. We interpret this argument to mean that Partington believes Hawaii's interpretation of the attorney-client privilege imposes a procedural bar that effectively prevents him from testifying on the issue of ineffectiveness because he cannot fully present his trial strategy defense.

Partington bears the burden of showing " 'that state procedural law bar[s] presentation of [his] claims.' "

(Continued from previous page)

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Pennzoil, 107 S.Ct. at 1528, *quoting Moore*, 442 U.S. at 432, 99 S.Ct. at 2381. Asserted ambiguities in Hawaii's rule regarding the attorney-client privilege or on the procedures available in Rule 13 proceedings for the presentation of his federal claims do not relieve him of this burden. Federal courts "cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims." *Pennzoil*, 107 S.Ct. at 1528. Moreover, given that Partington "has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.; see also Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. In addition, even if a federal plaintiff cannot raise his constitutional claims in state administrative proceedings that implicate important state interests, his ability to raise the claims via state judicial review of the administrative proceedings suffices. *Dayton Schools*, 477 U.S. at 629, 106 S.Ct. at 2724. Requiring a federal plaintiff to present his constitutional challenges in the state proceedings recognizes that state courts can and will perform their responsibility to safeguard federal constitutional rights. *See, e.g., Pennzoil* 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2520; *Trainor*, 431 U.S. at 443, 97 S.Ct. at 1917.

Partington has not met his burden. He does not explain how this alleged procedural bar prevents him from presenting his first, fifth, sixth, and fourteenth amendment claims in the Rule 13 proceedings. Nor has Partington unambiguously shown that Hawaii's "self-defense exception" to the attorney-client privilege, *see* DR

4-101(C)(4), *only* applies when a client attacks his attorney's conduct. *Cf.* ABA/BNA Lawyer's Manual on Professional Conduct, *Disclosure: Attorney's Benefit*, at 55:701, 703, 706-08(BNA)(Nov. 11, 1987) (discussing cases where the privilege does not apply even though the client is not attacking the attorney's conduct.) In any event, Partington "should first set up and rely upon [this procedural] defense in the [Hawaii] state courts." *Younger*, 401 U.S. at 45, 91 S.Ct. at 751, *quoting Fenner v. Boykin*, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed. 927 (1926). We cannot assume that Hawaii will interpret its attorney-client privilege to bar Partington from speaking in his own defense. *Pennzoil*, 107 S.Ct. at 1528.

Second, Partington argues that the third prong for abstention is not met in this case because both the special master and the Hawaii Supreme Court are biased against him. In *Gibson*, the Supreme Court recognized that if the federal plaintiff can establish that either the state administrative tribunal or the state court is not "competent" because of bias, then abstention is not appropriate. *See* 411 U.S. at 577, 93 S.Ct. at 1697. In addition, it recognized that de novo judicial review on the decision of a "biased" administrative board does not satisfy the competent tribunal requirement of the third predicate for *Younger* abstention. *See id.* & n.16. Here, Partington contends that a finding in the Rule 13 proceeding before the special master or the Hawaii Supreme Court that he rendered effective assistance of counsel would be totally incompatible with the Hawaii Supreme Court's decision in *State v. Clarke*. From this, he concludes that the issue of ineffectiveness has been prejudged against him. Partington further assails the impartiality of the Hawaii Supreme Court

by asserting that the large amount of publicity that *State v. Clarke* generated has biased the Hawaii Supreme Court against his case.

In claiming bias, Partington must overcome the presumption that the special master and the Hawaii Supreme Court are unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982). He can rebut this presumption "by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

In support of his claim of judicial bias, Partington relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (*Withrow*). The Court there examined a Wisconsin statute that allowed a state medical examining board to warn and reprimand a physician, to suspend a physician's license temporarily, or to institute a criminal action or an action to revoke a license when it found probable cause under governing criminal or revocation statutes. *Id.* at 37, 95 S.Ct. at 1459. When the medical examining board commenced investigative proceedings against Larkin, Larkin filed suit in federal court under 42 U.S.C. § 1983 seeking an injunction against the investigation, which was initially denied by the federal district court. *Id.* at 39, 95 S.Ct. at 1460. The board subsequently notified Larkin that it would hold a "contested hearing" in order to determine whether to suspend his license temporarily. *Id.* at 40-41, 95 S.Ct. at 1461. The federal district court then enjoined the board because it concluded that by authorizing the board to perform a dual investigatory and adjudicative function, the Wisconsin statute raised serious procedural due process concerns by permitting a physician to lose his liberty or property at

the hands of a biased decisionmaker. *Id.* at 41-42, 95 S.Ct. at 1462.

The Supreme Court reversed the preliminary injunction, concluding that it was "quite unlikely" that the physician would ultimately prevail on his procedural due process challenge. *Id.* at 46, 95 S.Ct. at 1464. Recognizing that biased decisionmakers do not satisfy procedural due process, *id.*, at 46-47, 95 S.Ct. 1464, the Court nonetheless rejected the contention "that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication." *Id.* at 47, 95 S.Ct. at 1464. Instead, the Court emphasized that one who advances such an argument

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and [he] must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. In repudiating the appellant's claim of presumptive bias, the Court observed that when an appellate court reverses an administrative law judge or a lower court judge, procedural due process does not mandate that a new judge retry the case. *Id.* at 48-49, 95 S.Ct. at 1465. Similarly, the Court rejected the proposition that simply because the board issued written findings of fact and conclusions of law in support of its probable cause determination, the board had prejudged the case. *Id.* 56-57, 95 S.Ct. at 1469. The Court pointed out that an initial finding

of probable cause to believe a physician had violated a statute was not logically inconsistent with a subsequent decision, based on complete evidence brought out at an adversarial hearing, that the physician did not violate the statute. *Id.* at 57-58, 95 S.Ct. at 1469-70.

Partington argues that *Withrow* stands for the proposition that bias is established where the accusatory finding is incompatible with any adjudicative finding. He relies on the statement from *Withrow* that "if the initial view of the facts based on the evidence derived from nonadversarial processes as a *practical* or *legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58, 95 S.Ct. at 1470 (emphasis added). From this interpretation of *Withrow*, Partington then argues that the following three factors all indicate that he is legally foreclosed from contesting the Hawaii Supreme Court's finding of ineffectiveness of counsel in *State v. Clarke*: (1) the title of Rule 13, "Proceedings Following Final Adjudication Of Ineffective Assistance Of Counsel In Criminal Cases," indicates that the decision is final; (2) the text of Rule 13, in part, speaks only of the special master determining whether "corrective action" should be taken; and (3) the Hawaii Supreme Court's order appointing the special master states that there was "a finding of ineffective assistance of trial counsel."

Under the third prong of *Younger*, Partington must demonstrate that he would not have an adequate opportunity to litigate his federal constitutional claims – in this case, as he argues, before a competent and unbiased state adjudicator. *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521;

Gibson, 411 U.S. at 577, 93 S.Ct. at 1697.[3] He has not done so. The Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the criminal case. There is neither legal nor practical reason to believe that the Hawaii Supreme Court will be biased on this issue which it has never addressed. We cannot and should not guess how the court will respond. *Withrow* is irrelevant to Partington's unaddressed due process claims.

Moreover, we conclude that Partington has not demonstrated under *Withrow* that, as a practical or legal matter, the special master or the Hawaii Supreme Court is

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[3] The dissent suggests that we have misunderstood the third prong of the *Middlesex* test, the prong requiring that federal claimants have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. It is true that in neither *Middlesex* nor *Younger* is a biased tribunal mentioned under this third prong. The majority and the dissent agree that *Younger* abstention is inappropriate when bias renders a state tribunal incompetent; we disagree over how to categorize the Supreme Court's decision in *Gibson*. *Gibson* analyzed incompetency caused by bias in connection with the plaintiff's opportunity to litigate federal constitutional claims before a competent state tribunal. 411 U.S. at 577, 93 S.Ct. at 1697. The dissent, however, focuses on dictum in *Kugler v. Helfant* categorizing the biased tribunal finding in *Gibson* as an "extraordinary circumstance." 421 U.S. at 124-25 & n. 4, 95 S.Ct. at 1530-31 & n. 4. Despite this dictum, we believe it better to follow *Gibson's* approach of analyzing bias in connection with whether there is an opportunity to litigate the federal constitutional claims, which became the third *Middlesex* prong.

bound by *State v. Clarke* or has prejudged the ineffectiveness issue. *Cf. Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 779 & n. 10 (9th Cir.1982) (rejecting claim that a school board could not, consistent with due process, conduct an impartial hearing to review its prior decision to terminate a teacher's employment). As for the legal issue, the title of Rule 13 is somewhat troubling in that it may indicate that the finding of ineffectiveness is conclusive. Furthermore, the Rule itself is not clear on the issue of whether defense counsel can contest the issue of ineffectiveness anew before the special master and the Hawaii Supreme Court, and the Chief Justice's order appointing Gedan can be read as indicating that the Supreme Court has already decided the ineffectiveness issue. But, as we have already observed, Partington bears the burden of demonstrating, through "unambiguous authority", that both the special master and the Hawaii Supreme Court are precluded from considering the ineffectiveness issue de novo. *See Pennzoil*, 107 S.Ct. at 1528; *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2522. We do not believe that Partington has carried this burden by reciting the foregoing factors. Rule 13 states in its second paragraph that defense counsel is only *"alleged* to have been incompetent." (Emphasis added.) The special master, moreover, has the power to dismiss the proceedings. This power presumably includes the power to conclude that the criminal defense attorney did not in fact render ineffective assistance.

The Hawaii Supreme Court's initial determination of ineffectiveness will apparently not have collateral estoppel effect in the Rule 13 proceedings. *See Santos v. State Department of Transportation*, 64 Haw. 648, 652, 646 P.2d

962, 965-66 (1982) (per curiam) (discussing issue preclusion under Hawaii law). This conclusion is consistent with a letter written by the Chief Justice to Partington and others stating that Rule 13 provides "a procedure where the attorney in question ha[s] an opportunity to contest, on his own behalf, the charge of ineffective assistance of counsel, before an impartial master, who is in no way bound by the previous determination in the criminal case. . . . " If the attorney disagrees, the Rule "provides for the master's determination to be reviewed by the Supreme Court. . . . " In *Middlesex*, the Court considered the actions of the New Jersey Supreme Court clarifying Hinds's ability to raise his constitutional challenges. 457 U.S. at 436, 102 S.Ct. at 2523. Although the Hawaii Supreme Court has not formally spoken on this issue, we believe that, in the absence of clear authority to the contrary, the letter of the Chief Justice can be considered as an interpretive gloss for purposes of abstention clarifying that, as a legal matter, Partington will be able to contest the finding of ineffectiveness during his Rule 13 proceedings. In addition, the primary issue before the special master and, perhaps ultimately, the Hawaii Supreme Court, is whether corrective action is warranted under Rule 13. Partington does not contend that the court has prejudged this issue.[4]

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[4] Relying on *Gibson*, the dissent suggests that the majority has misconceived "the basic rule governing abstention and biased state tribunals" (dissent at p. 137) because we require inquiry of a biased state tribunal whether it is biased. Dissent at pp. 137-138. While we do not disagree with the legal premise, the dissent overlooks that there has been no finding that

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We also find no practical limitation on Partington's ability to address any of his arguments to an impartial tribunal. To the extent that Partington believes that certain members of the Supreme Court may be personally biased against him, either by virtue of their finding of ineffectiveness of counsel in *State v. Clarke* or as a result of the high profile nature of the publicity in that case, he may be able to file an affidavit seeking recusal under Haw.Rev.Stat. § 601-7(b) (1985).[5] *Cf. Flangas v. State Bar of*

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the Supreme Court of Hawaii is biased on the constitutional issues.

But more important, *Gibson* is distinguishable from the instant case. The state tribunal in *Gibson* was the Alabama Board of Optometry, "the statutory body with authority to issue, suspend, and revoke licenses for the practice of optometry." 411 U.S at 567, 93 S.Ct. at 1692. This Board was comprised solely of practicing optometrists. *Id.* at 571, 93 S.Ct. at 1694. Of course, a tribunal comprised of optometrists does not have the ability to entertain constitutional claims. Optometrists are incompetent in this area; their domain is the visual process, not due process. By contrast, the state tribunal in *Partington* is a court, indeed, the Hawaii Supreme Court. It is comprised of experienced jurists. That this court has the ability to entertain and resolve constitutional claims is incontrovertible. There is simply no comparison between State Supreme Court justices and a group of optometrists in their competency to face constitutional issues: Justices are competent, optometrists are not. Partington has failed to demonstrate that he will not be afforded the opportunity to litigate his constitutional claims before a competent state tribunal. The third prong of *Middlesex* requires us to abstain. Contrary to the dissent's assertion, *Gibson* does not dictate a different result.

[5] Haw.Rev.Stat. § 601-7 provides:

(a) No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity

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Nevada, 655 F.2d 946, 950 (9th Cir.1981) (holding that this court cannot ascertain the availability of the biased adjudicator exception to *Younger* abstention until appellant attempts to avail himself of state statutory procedures to disqualify allegedly biased supreme court justices). Hawaii provides that Hawaii circuit judges and retired Supreme Court Justices may sit on the Hawaii Supreme Court when one of the Justices recuses himself. *See*

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within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been of counsel or on an appeal from any decision or judgment rendered by the judge.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

Haw.Rev.Stat. § 602-10 (1985).[6] The statute even contemplates that some cases may arise in which all five Supreme Court Justices would recuse themselves, *id.* Moreover, we must presume that each Hawaii Supreme Court Justice will follow his duty under Haw.S.Ct.R. 5 to "be unswayed by partisan interests, public clamor, or fear of criticism," Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct, Canon 3(A)(1), and to recuse himself if "he has a personal bias or prejudice concerning a party. . . . " Haw.S.Ct.R. 5, *incorporating* Code of Judicial Conduct,

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[6] Haw.Rev.Stat. § 602-10 provides:

> Parties shall be entitled to bring an appeal before a full court. Oral argument shall be before a full court; provided that in an appropriate case the court in its discretion may dispense with oral argument. In case of a vacancy, or if a justice of the supreme court is disqualified from sitting in any case pending before this supreme court, or is unable to attend, or is absent, or is recused or has been excused, the vacancy or the place of such justice may be temporarily filled by a circuit judge designated by the chief justice or by the appointment of a justice who has retired from the supreme court. Such retired justice chosen to serve as substitute justice shall not be actively engaged in the practice of law. A retired justice, when sitting as substitute justice, shall be compensated at a rate of pay of associate justices of the supreme court. When necessary, the court may consist of five circuit judges, so designated or five retired justices so appointed or any combination of circuit judges and retired justices. After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.

Canon 3(C)(1)(a). Partington has provided no reason to strip these individuals of the "presumption of honesty and integrity." *See Withrow,* 421 U.S. at 47, 95 S.Ct. at 1464.[7]

B.

Even if the necessary three predicates exist, however, *Younger* abstention will not be appropriate if the federal plaintiff can establish (1) that the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) that some other "extraordinary circumstances" exist, such as proceedings pursuant to a "flagrantly" unconstitutional statute. *See, e.g., Younger,* 401 U.S. at 49-50, 53-54, 91 S.Ct. at 753, 754-55.

1.

The scope of *Younger*'s bad faith exception is not clear. Although the Court in *Younger* and its progeny has continuously recognized that abstention would not be required if a federal plaintiff could establish that the state court proceedings were instituted in bad faith, the Court has never actually applied the exception. Federal circuit courts, however, have occasionally found that "bad faith" exception applicable. *See, e.g., Rowe v. Griffin,* 676 F.2d

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[7] The dissent draws attention to language in the Chief Justice's April 27, 1987, letter to Partington which, the dissent suggests, indicates that the Chief Justice has prejudged Partington's due process and equal protection claims. Dissent at p. 138 n. 8 & p. 144 n. 24. The Chief Justice is at liberty to recuse himself if his impartiality or the appearance of judicial objectivity is drawn into question.

524, 525-26 (11th Cir.1982); *Heimback v. Lyons*, 597 F.2d 344, 346-47 (2d Cir.1979) (per curiam); *Wilson v. Thompson*, 593 F.2d 1375, 1381-83 (5th Cir.1979). No bad faith has been demonstrated in this case.

2.

Because "[t]he very nature of 'extraordinary circumstances' . . . makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention in state criminal proceedings," *see Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S.Ct. 1524, 1530, 44 L.Ed.2d 15 (1975), the scope of *Younger's* "exceptional circumstances" exception is also unclear. As with the bad faith exception, the Supreme Court has consistently recognized the exception, but has never held that the exception applied.

The exception clearly recognizes, however, that a federal court need not abstain when faced with a flagrantly unconstitutional statute. *See Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55. This aspect of the exception applies only when a statute is " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Id., quoting Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941) (*Watson); accord Trainor*, 431 U.S. at 446-47, 97 S.Ct. at 1919.

Partington argues that Rule 13 flagrantly violates the first amendment, procedural due process, and the equal protection clause of the fourteenth amendment on its face

and as applied. We have examined the arguments that Partington makes in challenging Rule 13. He has certainly raised some colorable constitutional arguments. Nonetheless, he has failed to demonstrate that Rule 13 is " 'patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' " *Younger*, 401 U.S. at 53-54, 91 S.Ct. at 754-55, *quoting Watson*, 313 U.S. at 402, 61 S.Ct. at 967. Therefore, we reject Partington's argument that this exception prevented the district court from abstaining.

IV

Partington also contends that the Hawaii Supreme Court's decision in *State v. Clarke* (1) violated the first amendment because the decision had a chilling effect on his ability to hold himself out as a competent counsel, (2) violated the fifth and fourteenth amendment because the decision deprived him of a liberty and property interest in his reputation without due process of law, and (3) violated the sixth amendment which he argues "necessarily includes a corresponding right of a criminal defense attorney to practice his profession without unreasonable hindrances." Partington believes that both the fifth amendment and the sixth amendment require courts to grant a "pre-deprivation" hearing to all defense counsel alleged to have rendered ineffective assistance and that the Hawaii Supreme Court, in deciding *State v. Clarke* did not comply with these constitutional requirements. Partington argues that the special master lacks the power to analyze these issues or to undo these constitutional harms and that it is unreasonable to believe that the

Hawaii Supreme Court will analyze these issues or undo these harms; therefore, abstention is not appropriate. Accordingly, Partington requests a declaratory judgment stating that in rendering its decision in *State v. Clarke* and concluding that Partington rendered ineffective assistance of counsel, the Hawaii Supreme Court violated the first, fifth, and sixth amendments.

The district court did not expressly address any of these arguments or the requested declaratory relief regarding the Hawaii Supreme Court's decision in *State v. Clarke*. At oral argument, we expressed doubt whether Partington presented these constitutional challenges in the district court concerning the manner and the effect of the Hawaii Supreme Court's decision in *State v. Clarke*. We pointed out that the prayer for relief in Partington's complaint did not request a declaratory judgment that in rendering its decision in *State v. Clarke* the Hawaii Supreme Court violated the first, fifth, and sixth amendments. Rather, the complaint states that because of the defendants' action he "is entitled to . . . [a] declaratory judgment that HSCR 13 as applied to Plaintiff is unconstitutional." At oral argument, Partington contended that his request for declaratory relief in the context of Rule 13 included the first, fifth, and sixth amendment challenges to the Hawaii Supreme Court's decision in *State v. Clarke*. He claims that he couched his request for relief in terms of Rule 13 because the Hawaii Supreme Court's decision in *State v. Clarke* was the "first step" under Rule 13. He argued that even if his complaint was not totally clear on the requested relief, his brief in the district court made his argument concerning the Hawaii Supreme Court's decision in *State v. Clarke* clear.

Gedan and Chang denied that Partington had presented this challenge in the district court. They contend not only that it would be inappropriate to allow Partington to bypass the district court, but also that such an attack on *State v. Clarke* implicates the *Rooker-Feldman* doctrine forbidding lower federal courts to sit in direct review of state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *see also Mackay v. Pfeil*, 827 F.2d 540, 543-45 (9th Cir.1987) (per curiam); *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-93 (9th Cir.1986) (*Worldwide Church of God*).

We have reviewed Partington's complaint and the brief he submitted to the district court. Although we might be able to read Partington's rather unclear brief as contesting the constitutionality of the Hawaii Supreme Court's decisionmaking process in *State v. Clarke*, his complaint merely sought declaratory and injunctive relief against the defendants – Gedan and Chang – involved in the Rule 13 proceedings. Thus, the lack of clarity in his brief and the wording of his complaint lead us to conclude that he did not clearly raise the issue in the district court.

Ordinarily, we will decline to review an issue not clearly raised in the district court unless necessary to prevent manifest injustice, unless a new issue arises while the appeal is pending because of a change in the law, or unless the issue is purely one of law that is both central to the case and important to the public and the necessary facts are fully developed. *See Romain v. Shear*, 799 F.2d

1416, 1419 (9th Cir.1986) (per curiam), *cert. denied*, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 840 (1987); *Yuchert v. Heckler*, 774 F.2d 1365, 1367 (9th Cir.1985), *rev'd on other grounds*, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). Even if one of these exceptions apply, we retain discretion to decline to address the issue.

We decline to review on this appeal Partington's attack on the Hawaii Supreme Court's decisionmaking process and judgment in *State v. Clarke*. The arguments implicate the *Rooker-Feldman* doctrine and neither party has briefed this significant issue. *Cf. Worldwide Church of God*, 805 F.2d at 893 n. 4 (noting that the *Rooker-Feldman* doctrine applies to section 1983 actions).

V

Gedan and Chang requested costs and attorney fees pursuant to Fed.R.App.P. 38. Under Rule 38, we may award fees and single or double costs "when the result is obvious and the arguments on appeal wholly lack merit." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir.1987) (citation omitted). Gedan and Chang contend that Partington's attempts to distinguish *Middlesex* were frivolous.

In response to this request for costs and attorney fees, Partington requested sanctions pursuant to Fed.R.Civ.P. 11 against Gedan and Chang for their request for costs and attorney fees. The Defense Lawyers joined Partington's request for sanctions.

We have power to sanction Gedan and Chang pursuant to Rule 11. *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United*

States Aircraft Insurance Group, 823 F.2d 302, 304-05 (9th Cir.1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986).[8] Though Gedan and Chang's request for Rule 38 sanctions appears in their opening brief, we consider their request as a separate motion to this court, severable from the balance of the brief.

The Seventh Circuit's discussion of a request for sanctions under Fed.R.App.P. 38 is particularly appropriate. The court limited its opinion to the defendant's request for attorney's fees under Rule 38. The court stated:

> The plaintiff's appeal, although not meritorious, is plainly not frivolous; it is the defendant's request for Rule 38 sanctions that is

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[8] The dissent suggests that Rule 11 is not a proper basis for imposing sanctions against Chang and Gedan. Conceding that this court has sanctioned attorneys pursuant to Rule 11, the dissent maintains that in each case the sanctionable conduct occurred in the district court. Dissent at 35 & n. 34. The dissent is mistaken. *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), held that:

> Curl's excuses do not relieve him of responsibility for having *brought an appeal* that should not have been brought, for subjecting Harvester to the burden of appellate litigation, and for having put this court to the task of *reading, analyzing, and judging his baseless arguments*. . . . The *brief* filed by Curl was not well-grounded in fact and he had not made reasonable inquiry.

Id. (emphasis added). Contrary to the dissent's assertion, dissent at 35 n. 34, *In re Curl* is not ambiguous. This court sanctioned Curl for much more than filing a frivolous notice of appeal in district court; we sanctioned him for conduct occurring in the appellate court.

> frivolous. We are troubled by the frequency with which lawyers in this court, whether representing appellants or appellees, are including in their briefs groundless requests for Rule 38 sanctions. The attitude seems to be, it can't hurt to ask. It can. Any frivolous motion, pleading, or request is subject to sanctions, including a motion or request for sanctions. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir.1987). We remind the bar that sanctions will be forthcoming if counsel routinely request Rule 38 sanctions without careful investigation to determine that the appeal or defense sought to be sanctioned is indeed frivolous. *See also Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir.1987).

Meeks v. Jewel Co., 845 F.2d 1421, 1422 (7th Cir.1988) (per curiam) (*Meeks*). We believe that *Meeks* fully applies to the request for attorneys' fees and costs by Gedan and Chang.

Far from being frivolous, Partington's and the Defense Lawyers' arguments that *Middlesex* did not compel abstention were excellent, although not ultimately meritorious. The arguments required us to examine closely the Rule 13 proceedings and interpret whether Partington would be able to raise his serious constitutional challenges to Rule 13 in the Rule 13 proceedings before the special master and, if necessary, on appeal to the Hawaii Supreme Court. Moreover, we fully expect that the special master and the Hawaii Supreme Court will examine carefully and seriously Partington's allegations that Rule 13 violates the first amendment free speech clause as incorporated by the fourteenth amendment, the fifth amendment guarantee of procedural due process as incorporated by the fourteenth amendment,

and the fourteenth amendment equal protection clause, both on its face and as applied. All of these issues are important and will require careful and detailed examination. To charge that these issues are frivolous is surprising – to claim Rule 38 sanctions for Partington's bringing them to our attention is the vice described by the Seventh Circuit in *Meeks*.

We deny the request by Gedan and Chang for Rule 38 sanctions and grant the Rule 11 request by Partington and the Defense Lawyers. We order Gedan and Chang to pay Partington's and the Defense Lawyers' costs and attorneys' fees incurred in responding to the motion for Rule 38 sanctions. The district court is instructed to determine the amount of the sanction.

AFFIRMED.

NOONAN, Circuit Judge, concurring:

I concur in the opinion of the court and note that the foundation of the dissent is that the Hawaii Supreme Court "is, as a matter of law, biased against Partington." I do not find it so easy to reach the dissent's conclusion in the light of what, in terms of current law and history, has constituted a biased tribunal. The ideal has always been an absolutely impartial judge. In practice, the ideal has been tempered by the qualification put by the old Constitution of Massachusetts which guaranteed a judge "as impartial as the common lot of humanity will admit." Constitution of Massachusetts, Part 1, Declaration of the Rights of the Inhabitants (1780). What the common lot of humanity will admit has varied.

A leading recent case from this circuit is *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Here a panel consisting of Circuit Judges Kennedy and Tang and District Judge Palmieri considered a criminal appeal by Joseph Conforte, the operator of a legalized house of prostitution in Nevada. The district judge who had presided at his trial had, as president of the Reno Unit of the American Contract Bridge League, participated in the decision to reject Conforte's application to join the League because of his prior convictions and proprietorship of the house of prostitution. At a cocktail party in 1973 the judge had also advised against accepting a contribution from Conforte for the University of Nevada football team. The judge had remarked the Conforte ran a house of prostitution and "was not good for Reno." *Id.* at 879.

District Judge Warren J. Ferguson heard Conforte's motion for a new trial on the grounds of the district judge's bias and found that the district judge had not been disqualified. *United States v. Conforte*, 457 F.Supp. 641 (D.Nev.1978). Upholding this ruling, Judge Kennedy for the panel stated: "We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. . . . [T]he negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind – [that evinces] an aversion or hostility of a kind or degree that a fair minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881.

This standard, it is apparent, is such that a previous legal ruling would not constitute disqualifying bias because it is not the kind of aversion or hostility that a

fair-minded person would be unable to set aside. Specifically, at a later point in the opinion, the panel held: "A judge's view on legal issues may not serve as the basis for motions to disqualify." *Id.* at 882 (citations omitted).

The history that lies behind this treatment of disqualifying prejudice as a term of art is worth reviewing. The Judiciary Act of 1789 provided that district judges should not review their own decisions on appeal to the circuit courts, but at the same time provided that Supreme Court Justices should regularly act as circuit judges and made no provision for disqualifying them from reviewing their own decisions. In 1790 Chief Justice John Jay composed a letter to be sent by the entire Supreme Court to President Washington on this problem. Jay pointed out that having once decided an issue, a justice would not be

> secured against the influence of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly, though, perhaps, too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

Letter from John Jay to James Iredell (Sept. 15, 1790) (enclosing draft), *reprinted in* 2 G. McRee, *Life and Correspondence of James Iredell* (1857). Jay also alluded to the case where a justice might disqualify himself from sitting on his own decision but the public would still believe that in the decision of the Supreme Court reviewing his decision, "mutal interest had generated mutual civilities and tendernesses injurious to right." *Id.* Chief Judge [sic] Jay observed that appellate cases were usually doubtful with "much appearance of reason on both sides"; it would shake the confidence of the losing litigant and the public

if the court in reaching such difficult questions appeared to be biased by the pre-judgment made by one or more of it members.

It is unclear whether any other justice signed Chief Justice Jay's letter. It was never sent. 1 J. Goebel, Jr., *History of the Supreme Court of the United States,* 556 (1971). The Supreme Court did not hesitate to act as a court of appeals from decisions of circuit courts made by the Justices as circuit judges. When in 1803 the practice was finally challenged by a litigant, the Court held that acquiescence in the practice prevented change. *Stuart v. Laird,* 1 Cranch 299, 309 (1803). The practice of judging appeals from one's own decisions continued in the Marshall court. *E.g., The Antelope,* 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825).

It could not be much clearer that the Founders and the early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him. Eventually by statute the practice ceased in 1891. Judiciary Act of March 3, 1891, ch. 517, 26 Stat. 826, § 3. But the problem has scarcely disappeared. It is the regular practice of the circuit courts of appeal to schedule sessions en banc in which panel members, who have previously heard the case, sit as members. The session is called a "rehearing" but the reality is that the reargument before the en banc court is a fresh hearing. Often there is new briefing and always there is new oral argument. There are always judges sitting who have never heard the case before. At the same time the judges on the en banc panel who have heard the case the first time and decided it are not

regarded as biased as a matter of law in sitting to judge this fresh appeal.

One difference exists between these practices and the case Partington presents. At least in the practices mentioned a party has had an opportunity to defend himself before the judge who ruled against him the first time, whereas Partington suffered an adverse ruling in a case where he had no possibility of defending himself. This distinction, however, is not material if the question is one of prejudice on the part of the judge. In the federal practices mentioned and in the Hawaii case the judges at one point have made up their minds. In the most literal sense they are prejudiced judges: they have prejudged the case now before them. In the federal practices it was and is assumed that they can unmake their minds and consider the case afresh. Why should this assumption not be the case in Hawaii?

When a litigant was, for the first time, permitted to challenge a federal judge on the grounds of bias, it was on the basis of a statute enacted in 1911. The challenge could only be for "personal bias or prejudice." Act of March 3, 1911, ch. 231, 36 Stat. 1090, § 21. Interpreting this statute, the Supreme Court said that the party seeking to disqualify the judge must "state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice." *Ex Parte American Steel Barrel, Co. and Seaman,* 230 U.S. 35, 43-44, 33 S.Ct. 1007, 1009-10, 57 L.Ed. 1379 (1913). Applying the statute to disqualify District Judge Keneshaw Mountain Landis in 1921, the Court observed that the bias "must be based upon something other than rulings in the case." *Berger v.*

United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). In *Denis v. Perfect Parts,* 142 F.Supp. 263 (D.Mass.1956), Judge Bailey Aldrich had ruled in a previous case that the patent in question was valid. When the same patentee brought a case against a different defendant, the defendant objected that Judge Aldrich was prejudice because he had already ruled on the validity of the patent. Judge Aldrich refused to disqualify himself, ruling, "The statute is directed to personal bias, not to previous judical exposure to the same or similar questions." *Perfect Parts,* 142 F.Supp at 263. The general standard that the bias must be personal and also arise from an extrajudicial source has been stated as the law of this circuit. *United States v. Carignan,* 600 F.2d 762, 763-64 (9th Cir.1979). A judge's participation in a "related or prior proceeding" is not sufficient even though he ruled against one of the present parties in that earlier proceeding. *Davis v. Fendler,* 650 F.2d 1154, 1163 (9th Cir.1981). The dissent appears unwilling to acknowledge that as the law now stands a prior adverse ruling by a judge does not show the judge to be biased.

The point could be raised that the Justices of the Hawaii Supreme Court might be prejudiced because of the publicity attending the reversal in the *Clarke* murder case. The fact of publicity generated by a judge's prior ruling was considered at length in the Watergate case where the defendants included John Ehrlichman, Bob Haldeman and John Mitchell. The Court of Appeals for the District of Columbia, sitting en banc, rejected the defendants' contention that Judge John Sirica had been biased against them because his "public image and reputation" had "become inextricably intertwined with the

prosecution of the Watergate matter." *United States v. Haldeman*, 559 F.2d 31, 137 (D.C.Cir.1976), *cert. denied sub. nom., Ehrlichman v. U.S.*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The court held that this kind of "interest" on the part of the judge was not disqualifying. Interest in order to disqualify must emanate from extrajudicial sources, otherwise "the prohibition would have has a reach far beyond anything Congress could rationally have contemplated." *Id.* The court refused to hold that Judge Sirica had been impermissibly biased. *Haldeman* was favorably cited by Judge Kennedy in *Conforte*, 624 F.2d at 882.

Sensibilities no doubt are changing on the question of judicial bias. In 1765 Blackstone could write: " . . . the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea," 3 W. Blackstone, *Commentaries on the Laws of England* *361. While recusal on the basis of challenge by a litigant has existed in Roman law, canon law, and early English law, it had disappeared by Blackstone's time, *id.*, and was permitted in federal law only in 1911. Since that turning point there have been other signs that judicial disqualification may be looked at more sharply. For example, Judge Aldrich's decision in *Perfect Parts* was criticized by a student writer. Note, "Disqualification of Judges for Bias in the Federal Courts," 79 *Harv.L.Rev.* 1435, 1451 (1966). In 1974 Congress enacted the statute requiring judges to disqualify themselves if a reasonable person could doubt their impartiality. 28 U.S.C. § 455(a). The practice of the Supreme Court in its first century in relation to circuit decisions now looks strange to us. It

may be that the time will come when the participation of panel judges in en banc circuit hearings will appear an impermissible breach of impartiality. It may happen even that prior ruling on a matter will disqualify a judge from sitting on another case involving the same issue. But it is still generally recognized that it is difficult to lay down an absolute rule disqualifying a judge because he has ruled against a litigant in an earlier context. Note, *supra* at 1452. What due process requires is being worked out case by case. Given the history and the current state of law, the federal courts should give the Hawaii Supreme Court a chance to decide what due process requires.

In making that decision, a Justice of the Hawaii Supreme Court will be asking, "Have I so made up my mind by my earlier ruling in the criminal case that I cannot give a fair hearing to Partington's explanation of why he thought his strategy was appropriate?" and "Will public confidence in the courts be diminished if I, a justice who's already found Partington to have given ineffective assistance, now sit on a case where he is defending himself against this charge?" A federal court is not in a position to anticipate how a justice of the Hawaii Supreme Court will answer those questions.

The dissent places weight on a statement in *Withrow*, upholding a procedure in which a later acquittal by the administrative body concerned would not be "logically inconsistent" with a prior finding of probable cause. *Withrow v. Larkin*, 421 U.S. 35, 57, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712 (1975). There would, however, be no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary

proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer. The question of sixth amendment deprivation, decided in *Clarke*, is logically distinct from the disciplinary standards which Partington must meet to satisfy the Bar.

The dissent also places emphasis on the "practical" probability of prejudice. But the dissent admits that a judge may charge an attorney with violating Fed.R.Civ.P. 11, order him to show cause, conduct a subsequent hearing, and find against him. The dissent also admits that a court may cite an attorney for contempt of court, order him to show cause, and then preside over the contempt trial and find against him. As a practical matter, the probability of a judge in these circumstances having in mind a vivid impression of the professional breach of the lawyer, and being influenced by this impression, is much greater than the probability of an appeals court, months or years after the initial decision that occasioned the reference of the lawyer to disciplinary proceedings, being still prejudiced against the lawyer. The dissent is on treacherous grounds when it argues that practical prejudice is more likely in Partington's case that in the cases it accepts as routine judicial practice.

Judges have not been particularly good at recognizing their own biases. The major federal reforms have been made by the legislature – the elimination of Supreme Court Justices reviewing their own decisions in 1891; the introduction of recusal motions by litigants in 1911; the reasonable person test of objectivity in 1974.

This history suggests the need for heightened self-scrutiny. The impartiality that "the common lot of humanity will admit" is now closer to the ideal.

REINHARDT, Circuit Judge, concurring and dissenting.

I concur only in the order set forth at the end of part V of the majority opinion which awards certain costs and attorneys' fees to Partington and the Defense Lawyers. I dissent from the rest of Part V and all of Parts I through IV.

I do not believe that this is one of those exceptional cases in which *Younger* abstention is required. *See World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987). Rather, I believe we should now decide that by virtue of its prior decision in *State v. Clarke*, the Hawaii Supreme Court is biased against Partington on the issue whether he rendered ineffective assistance of counsel and that its holding of a disciplinary hearing would violate his due process rights. After applying the three-part test from *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), the majority concludes that *Younger* abstention is applicable. The majority would permit the Hawaii Supreme Court to resolve the question of its own bias. It reaches this conclusion solely on the basis of its reading of the third part of the *Middlesex* test. As the majority describes that part of the test, the plaintiff must be able "to litigate his federal constitutional claims . . . before a competent and unbiased state adjudicator." Majority op. at 125. Because the majority concludes that

the Hawaii Supreme Court may not be biased on the "constitutional question", it opts for abstention.

The majority misconceives the third part of the *Middlesex* test. Bias plays no role in the application of the three-part test. Rather, bias is an entirely separate matter. Where bias exists, *Younger* abstention is inapplicable, regardless of whether the three-part test is met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1530-31 & n. 4, 44 L.Ed.2d 15 (1975). The bias need not be on any particular claim. All that is necessary to bar abstention is that the Hawaii Supreme Court be biased on the disciplinary proceedings. Here, under Hawaii Supreme Court Rule 13, the supreme court would have to determine whether Partington rendered ineffective assistance of counsel to Clifford Clarke. However, that court has already decided in *State v. Clarke* that Partington's assistance *was* ineffective and that a murder conviction against Clarke must be reversed for that reason.[1] Thus, Partington would be subjected to judgment by a tribunal which has already reached a judgment *on the merits* of his case.[2] Because of its prior actions, the Hawaii Supreme Court is, as a matter of law, a biased forum with respect

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[1] At the oral argument in *State v. Clarke*, one of the justices of the Hawaii Supreme Court accused Partington of misconduct, contending that he had been deliberately ineffective at trial. As discussed in the text, the Hawaii Supreme Court ultimately reversed Clarke's conviction on the grounds that he received ineffective assistance from Partington.

[2] Subjecting Partington to disciplinary proceedings before a biased tribunal would violate his due process rights. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973).

to the Partington proceedings and the federal courts need not abstain.

The majority offers recusal of all of the justices of the Hawaii Supreme Court as a solution to the prejudgment problem. However, the structure of Rule 13 makes it clear that recusal of the entire court is not an available option in this case. Rule 13 was specifically designed to ensure that the justices of the supreme court would make the final determination of ineffective assistance, not a different group of judges. Recusal of the entire court in cases like Partington's would run directly contrary to the language and intent of the rule.

My conclusion that the Hawaii Supreme Court is biased against Partington is not meant to disparage the members of the court. They are undoubtly able individuals and are entitled to a presumption of honesty and integrity. They have no adverse pecuniary interest. Nevertheless, other "[c]ircumstances and relationships must be considered." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Bias exists where a court has prejudged, or reasonably appears to have prejudged, an issue. The disciplinary proceedings must "satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). In *State v. Clarke*, the justices concluded that the legal assistance Partington provided Clarke was ineffective, the very determination they would be called upon to make again in the Rule 13 proceedings. For this reason, a "realistic appraisal of psychological tendencies and human weakness" compels the conclusion that the Rule 13 proceedings involve an intolerably high risk of bias or prejudgment by the Hawaii

Supreme Court. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Under these circumstances, abstract principles of comity, *Younger v. Harris*, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), as important as they are, do not bar a federal court from exercising its jurisdiction.

In my view, we would not only be performing our duty as a federal court properly, but would be saving the Hawaii Supreme Court the expenditure of much unnecessary time and effort were we to declare Rule 13 unconstitutional now. I see little choice for the Hawaii court when Partington's case reaches the justices. If they fail to invalidate the rule, certainly the federal courts will ultimately be required to do so.

I

RULE 13

Hawaii Supreme Court Rule 13 provides a procedure for determining whether a defense attorney should be disciplined for providing ineffective assistance of counsel. Under the rule, whenever a criminal conviction has been overturned on that ground by either the supreme court or the intermediate appellate court[3], the supreme court appoints a special master to decide whether action against the attorney is warranted. The special master, in turn, appoints a special prosecutor. At the conclusion of the proceedings, the special master dismisses the proceedings or recommends to the supreme court that corrective action be taken against the attorney. Both the

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[3] See note 28, *infra*.

attorney and the special prosecutor may file exceptions to the special master's decision with the court. The supreme court reviews the special master's decision; the Court then makes an independent determination[4] whether the attorney provided ineffective assistance to the defendant and on that basis decides whether to dismiss the proceedings or order corrective action against the attorney.

II

PREJUDGMENT

Clearly, the critical feature of the Rule 13 proceedings is the determination of the Hawaii Supreme Court is required to make with respect to counsel's ineffectiveness. It must make this critical determination regardless of whether it or the intermediate appellate court made the earlier determination that counsel's representation was ineffective, and reversed the criminal conviction on that ground. Here, we are presented with an extreme form of the Rule 13 process: the supreme court, *sua sponte*, raised and determined the ineffectiveness issue during the criminal proceeding; it would now be required to resolve the identical issue a second time in the disciplinary proceeding.

The majority first asserts that *Younger* abstention is appropriate here because "[t]he Hawaii Supreme Court has never had the opportunity to hear Partington's argument that due process requires that he not be judged by the court after it has ruled on his performance in the

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[4] See note 12, *infra*.

criminal case. . . . We cannot and should not guess how the court will respond." Majority op. at 126. Thus, the majority apparently takes the position that Partington must demonstrate not only that the Hawaii Supreme Court has prejudged the merits of the disciplinary proceeding but also that the court has prejudged the issue of *whether* it has prejudged the merits of that proceeding.

The majority's argument misconceives the basic rule governing abstention and biased state tribunals. The fundamental principle is that compelling an individual to present his case to a biased tribunal offends due process and federal courts will enjoin such an unconstitutional proceeding. *Gibson v. Berryhill*, 411 U.S. 564, 570, 577, 93 S.Ct. 1689, 1693, 1697, 36 L.Ed.2d 488 (1973). When a federal claimant alleges that a state adjudicator is biased, it is the federal court which determines whether that allegation is correct. *See Gibson*, 411 U.S. at 578-79, 93 S.Ct. at 1697-98; *see also Kugler v. Helfant*, 421 U.S. 117, 125, 127-28, 95 S.Ct. 1524, 1531, 1532, 44 L.Ed.2d 15 (1975). The question is not referred to the state court. If the federal court concludes that bias exists, the finding of a due process violation follows automatically. *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697.[5] No more is required. The federal court does not abstain.[6] In short, abstention

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[5] *Cf. Kugler*, 421 U.S. at 128, 95 S.Ct. at 1532 (framing the abstention issue as whether the "judicial system provides procedural safeguards to guarantee that [the federal court plaintiff] *will not be denied due process of law* in the state trial or appellate process") (emphasis added).

[6] An exception exists where the state provides an alternate procedure which ensures a fair tribunal in place of the biased

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doctrine does not require a person to ask a tribunal that is biased on the merits of his case whether it is in fact biased. Nor must that person ask the biased tribunal whether the fact that it is biased would violate the due process clause. Clearly, it would – as a matter of federal constitutional law, and a federal injunction, not abstention, is the appropriate remedy.

Indeed, the parallel between Partington's situation and the one considered by the Supreme Court in *Gibson* is striking. *Gibson*, like the present case, was a disciplinary proceeding (license revocation) before a body that was allegedly biased on the revocation issue. Thus, the licensee faced a potential due process violation. Notably, in *Gibson*, the Court did not inquire into whether the state licensing agency was biased on the question of the validity of the challenged statutory procedure. Rather, it considered only the question whether the agency was biased as to "the revocation of appellees' licenses." 411 U.S. at 578, 93 S.Ct. at 1697. Moreover, it held irrelevant the fact that the state courts would review the revocation proceeding de novo. *Id.* at 577, 93 S.Ct. at 1697. Finally, the fact that petitioners had not sought to invalidate the unconstitutional state procedure in the available and unbiased state court forum did not deter the Court from affirming the district court's action enjoining the state proceeding. Procedurally, our case and *Gibson* are identical. In my opinion, *Gibson* is controlling here. If the

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tribunal, *e.g.*, by way of recusal. *See Kugler v. Helfant*, 421 U.S. 117, 127-128, 95 S.Ct. 1524, 1532, 44 L.Ed.2d 15 (1975). The applicability of the recusal exception is discussed in Section III, *infra*.

Hawaii Supreme Court is biased as to Partington's disciplinary issues, the result here should be the same as in *Gibson*; we should not abstain.

The majority attempts to distinguish *Gibson* on the basis that "a tribunal comprised of optometrists does not have the ability to entertain constitutional claims." Majority op. at 127 n. 4. This is not a material distinction. In deciding that *Younger* abstention was inappropriate, the Supreme Court did not even mention the fact that "a tribunal composed of optometrists" cannot hear constitutional claims, let alone rely on that fact (if indeed it is a fact).[7] Rather, the Court found *Younger* abstention unwarranted simply because the state tribunal (composed of optometrists or not) was biased *on the revocation issue*. No more was required to be shown in *Gibson*; no more should be required here. This point can not be overemphasized. If, as appears clear, the Hawaii Supreme Court is biased as to the merits of Partington's disciplinary proceeding, that tribunal is not competent to hear that proceeding – regardless of whether non-merit issues may be raised

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[7] I must confess that I do not know whether the majority's description of the powers possessed, in 1973, by the Board of Optometry under Alabama law is correct. In California until a few years ago, administrative agencies, including licensing boards, *did* have the power (and the duty, I believe) to make rulings on constitutional issues. This was so regardless of whether the board was an industry board or an industry-labor board, composed exclusively of laymen, or some other type of board. The Attorney-General's office provided advice to all these boards on constitutional questions and the boards then made their rulings. Long after 1973, the voters of California adopted an initiative measure removing from all administrative boards, including those composed of lawyers, the power to declare statutes unconstitutional.

during that proceeding, or whether the court is or is not biased as to any of those non-merit issues.

Conversely, the majority asserts that *Younger* abstention is required here because the Hawaii Supreme Court "has the ability to entertain and resolve constitutional claims." Majority op. at 127 n. 4. In essence, the majority appears to be contending that it is proper to force an individual to appear before a biased tribunal in a disciplinary proceeding, so long as that tribunal could conceivably avoid reaching the merits of the proceeding. My reading of *Gibson* leads me to the contrary conclusion. An individual can *not* be summoned before a biased tribunal when the primary issue before the tribunal is the very issue on which it is biased. It is fundamental that compelling an individual to present his case to a biased tribunal offends due process. *Gibson*, 411 U.S. at 570, 577, 93 S.Ct. at 1693, 1697. An individual required to appear before a state tribunal that is biased on the merits of the proceeding may resort directly to federal court, whether or not the state tribunal has the authority to dismiss the proceedings for bias, lack of jurisdiction, or on any other grounds.[8] As *Gibson* illustrates, the fact that there are state remedies for resolving or determining the fairness of the procedure is irrelevant, regardless of when or in what state forum that determination could be made.

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[8] Where state law provides that a biased judge must recuse himself, the state law does *not*, of course, require the individual to appear before a biased tribunal (except, possibly, in some instances for the limited purpose of filing the disqualification motion). The question of recusal is discussed in Section III, *infra*.

In *Gibson*, the Supreme Court stated explicitly that *Younger* abstention is not required "simply because [state] judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). Moreover, it is clear that the federal court plaintiff in *Gibson* had a completely unbiased state court system in which to seek injunctive relief prior to the administrative proceedings and thus had perfectly adequate state court remedies for his due process claims. For example, he could have asked a state trial or appellate court, rather than a federal district court, to enjoin those proceedings. An unbiased state court is, as the majority points out, generally presumed to be as capable as a federal court of protecting federal constitutional rights. Nevertheless, the Supreme Court in *Gibson* did not require the plaintiff, to first seek relief in state court. Rather, he was permitted to go directly to *federal* court to obtain the appropriate remedy – a federal court injunction against the proceedings in the biased state forum.

The only difference between the facts and circumstances of *Gibson* and those in this case (other than the distinction previously discussed) is that in *Gibson*, the state provided *both* an entirely unbiased state court review of the unconstitutional proceedings *and* an unbiased state court system in which to seek an injunction against the unconstitutional proceedings, while here, there is *neither* an entirely unbiased state forum in which Partington could seek injunctive relief before the unconstitutional proceedings are held *nor* one in which he

could do so afterwards.[9] In Partington's case, the Hawaii Supreme Court is not only the biased forum, but also the first and last judicial body from which Partington may seek relief. Thus, the state court remedies in *Gibson* were, if anything, far *more* hospitable to the plaintiff than those offered to Partington here. As *Younger* abstention was improper in *Gibson*, it is *a fortiori* improper here, if as I conclude, the Hawaii Supreme Court is biased on the ineffective assistance claim.[10]

The majority's confusion regarding abstention and bias appears to be due to its misunderstanding of the third prong of the *Middlesex* test. The majority consistently describes that prong as requiring that Partington have the ability to litigate his constitutional claims before an unbiased state adjudicator. Majority op. at 120-121, 125-126. Actually, the third prong of *Middlesex* does not mention bias – because under *Younger* that issue is dealt with separately. The third prong requires only that Partington have "an adequate opportunity in the state proceedings to raise constitutional challenges." 457 U.S. at 432, 102 S.Ct. at 2521. The critical fact that the majority overlooks is that in *Younger*, the Supreme Court recognized that even if the three-part test for abstention (as

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[9] I seriously doubt that, as a legal matter, a lower court, in Hawaii or elsewhere, has the authority to enjoin a proceeding before a higher court.

[10] In some instances, a *claim* of bias would be sufficient to preclude abstention, at least until the federal court has had an opportunity to resolve the factual issues relating to the claim. Here, however, there are no factual issues in dispute with respect to the alleged bias.

later described in *Middlesex*) was met, abstention would be improper if the state action was brought in bad faith or for purpose of harassment or in other *extraordinary circumstances*. 401 U.S. at 53-54, 91 S.Ct. at 754-55; *see also Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524. Bias on the part of the state tribunal is one of those extraordinary circumstances which renders *Younger* abstention inappropriate, even if all three prongs of the *Middlesex* test are met. *Kugler v. Helfant*, 421 U.S. 117, 124-25 & n. 4, 95 S.Ct. 1524, 1531 & n. 4; *cf. World Famous Drinking Emporium*, 820 F.2d at 1082. Thus, it is simply irrelevant whether Partington will be able to raise his constitutional claims before the Hawaii Supreme Court or whether the Court is biased as to those claims; for if the Court has prejudged the merits of the disciplinary proceeding, it is a biased tribunal and *Younger* abstention is inapplicable.[11]

The majority dismisses the Court's statement in *Kugler* that bias is a separate element by calling it dictum. Majority op. at 22 n. 3. Whatever the merits of that categorization, it seems apparent that the Court was correct when it reached its conclusion. *Younger* abstention is barred when, *inter alia*, "extraordinary circumstances" render the proceedings unfair, a concern that is

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[11] It is worth noting that a letter dated April 27, 1987 to Partington from the Chief Justice, a letter the majority appears to accept as the view of the entire court, Majority op. at 126, suggests that the court has in fact prejudged the due process claim. *See* ER 444 (Chief Justice finds "mystifying" Partington's contention that he could not receive an impartial hearing on the ineffectiveness claim). Surprisingly, at a later point in the majority opinion, the letter is summarily dismissed as at most reflecting the opinion of the Chief Justice. Majority op. at 128 n. 7.

independent of whether the federal court plaintiff will have an adequate opportunity in the state proceedings to raise his federal constitutional claims. *Middlesex* listed as examples of this rule a proceeding brought in bad faith or for purposes of harassment. 457 U.S. at 435, 102 S.Ct. at 2522. Certainly a proceeding brought before a biased tribunal is even more unfair to a licensee, and even more violative of his due process rights, than a proceeding that is merely initiated for an improper purpose. In the case of bad faith or harassment, the licensee is required to submit to a proceeding unnecessarily, but should prevail on the merits; in the case of bias, the licensee does not have a fair chance to prevail at all, and an adverse result is, for practical purposes, a foregone conclusion. Thus, the Court's determination in *Kugler* that bias is an "extraordinary circumstance" barring *Younger* abstention was compelled by reason and logic as well as precedent, and the majority clearly errs in rejecting the Court's analysis.

In any event, whether bias is considered separately from the three-prong *Middlesex* test, or whether we disregard the clear language in *Kugler* and consider bias to be a part of the third prong of that test, the result in this case would be the same. As previously discussed, under *Gibson* it is clear that bias on the merits of a disciplinary proceeding is sufficient to preclude *Younger* abstention.

The majority next concludes that the Rule 13 procedure does not present an unacceptable risk of prejudgment on the ineffectiveness issue, although it is far from clear why it reaches that conclusion.[12] Majority op. at 125.

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[12] At one point, the majority argues that Partington has not alleged that the Hawaii Supreme Court is biased "on the

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The majority appears to accept the *Withrow* test, which states that "if the initial view of the facts based on the evidence derived from non-adversarial processes as a *practical or legal* matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question [is] raised." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470 (emphasis added). With respect to the issue of "legal" bias, the majority concludes that Partington has not demonstrated that the Hawaii Supreme Court is legally foreclosed "from considering the ineffectiveness issue de novo." Majority op. at 126. On that point, I am in agreement.[13] However, the majority also concludes that there is

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primary issue . . . [namely] whether corrective action is warranted [against Partington] under Rule 13." Majority op. at 126. Any distinction between whether the court is biased "merely" on the ineffective assistance issue rather than on the corrective action issue is semantic gameplaying at best. I find it hard to believe that anyone would suggest that a court that has prejudged the issue whether Partington rendered ineffective assistance is unbiased on the question whether he should be the subject of disciplinary action. The Hawaii Supreme Court is *necessarily* required to judge the issue on which it is biased *before* determining the appropriate remedy. Obviously, if the court were to decide the issue relating to conduct in Partington's favor, there would be no need for it to reach the question whether corrective action is warranted.

[13] Partington has not demonstrated by unambiguous authority that the court is legally precluded from reconsidering its initial determination of ineffectiveness. For the purposes of our *Younger* analysis, we must assume that the Hawaii

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no "practical" impediment to the Court's examining the issue in a fair and impartial manner. *Id.* at 125, 126. The majority offers *no* explanation for this conclusion, and cites no case law or other authority. In fact, the majority opinion contains no discussion whatsoever of the question whether the Hawaii Supreme Court could, as a practical matter, serve as an unbiased adjudicator. Instead, it avoids the issue entirely, apparently preferring to base its conclusion that Partington will be able to obtain a fair hearing entirely on the supposition that all of the members of the supreme court will recuse themselves.[14] *Id.* at 126.

I believe that, as a practical matter, the Hawaii Supreme Court has prejudged Partington's case. At the very least, there is an intolerable risk of prejudgment. The sole reason Partington is now facing disciplinary proceedings is because in a previous proceeding the Hawaii Supreme Court, *sua sponte*, raised *and decided*, on the merits, the issue of ineffective assistance of counsel in a manner adverse to him. The issue the court previously decided is the identical issue it will now be required to address in the Rule 13 proceedings. In my view, the Hawaii Supreme Court is not, as a practical matter, an unbiased adjudicator.

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Supreme Court is free to reexamine its previous legal conclusion on the question of ineffective assistance. If, however, this assumption turns out to be incorrect, I do not think anyone could argue that the Rule 13 proceeding would satisfy due process.

[14] The question of recusal is discussed *infra*, section III.

There are several federal statutes which are concerned with the issue of judicial bias. *See* 28 U.S.C. §§ 47, 144, & 455 (1982). These statutes are premised on the simple proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). But a fair trial means more than simply the absence of actual bias. "[O]ur system of law has always endeavored to *prevent even the probability of unfairness.*" *Id.* (emphasis added). To this end, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)). Thus, we must constantly be alert to procedures which "under a realistic appraisal of psychological tendencies and human weakness . . . pose[] such a risk of actual bias or prejudgment that the practice[s] must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

While we can readily identify the reasons why judicial bias cannot be tolerated, we must still determine when a judge's previous involvement with a case creates such a risk of bias that it would be a violation of due process to allow him to be further associated with the proceedings. Two decisions help frame the issue. Prejudgment, or an unconstitutional risk of prejudgment, has been found where the contents of a speech by a judge "plainly reveale[d]" that he had, prior to the commencement of the proceedings before him, reached a conclusion as to the merits of a case that involved complex questions of fact and law. *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (D.C.Cir.1964), *vacated on other grounds*,

381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714 (1965).[15] Also, judges have been disqualified from presiding over appeals from decisions in cases, or involving issues, originally tried before them as lower court judges. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 137 (5th Cir.1970) (Order of Disqualification and Memorandum of Decision by Craven, J.) (appeals court must "be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of first instance") (quoting *Moran v. Dillingham*, 174 U.S. 153, 19 S.Ct. 620, 43 L.Ed. 930 (1899)).[16]

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[15] Our present Chief Justice has said that the mere fact that a judge has expressed an opinion on a purely legal question would not demonstrate bias or prejudgment, *Laird v. Tatum*, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum on recusal by Rehnquist, J.). We have reached the same conclusion. *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). The situations discussed by Justice Rehnquist and by this court in *Conforte* were far different from the one present in *Texaco*. *Conforte* is discussed further *infra*, note 20.

[16] In *Swann*, Judge Craven applied 28 U.S.C. § 47, which explicitly forbids the practice of a judge hearing an appeal from a case which he tried. The same result has been reached through application of 28 U.S.C. § 455, which requires a judge to recuse himself to avoid the appearance of impropriety. *Rice v. McKenzie*, 581 F.2d 1114, 1116-18 (4th Cir.1978) (federal judge, who, as chief justice of state supreme court, had presided in affirming appeal of convicted person was disqualified from federal habeas corpus proceedings because of concerns with impartiality). *Cf. Withrow*, 421 U.S. at 58 n. 25, 95 S.Ct. at 1470 n. 25 ("when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review").

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While *Texaco* and *Swann* provide some guidance, there are significant differences between those cases and Partington's. The commissioner's prejudgment in *Texaco* was extrajudicial; the remarks were made during a public appearance and were not based on knowledge the commissioner obtained during an official proceeding. *Cf. United States v. Studley*, 783 F.2d 934 (9th Cir.1986). *Swann* was concerned with the issue of what constitutes a meaningful review by a higher court of a lower court's decision. In the present case, the issue is: when is a court that is called upon to decide a complex question of law and fact as to which it has already reached a final determination in an earlier proceeding presumed to have prejudged the question?

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In light of current practice, the comments in the concurring opinion on the history of the practice of the Supreme Court acting "as a court of appeals from decisions of circuit courts made by the Justices as circuit judges," Concurring op. at 132, and specifically its discussion of *Stuart v. Laird*, 1 Cranch 298 (1803), and *The Antelope*, 23 U.S. (10 Wheat.) 66, 6 L.Ed. 268 (1825), while interesting, shed no light on the specific issue before us. Just as our view of the slave trade has changed from that espoused in *The Antelope*, so too has our view of the propriety of judges sitting in judgment on their own decisions. Moreover, in *The Antelope*, no challenge was made to the individual Justice's participation in an appeal from a case in which he had sat as a circuit judge; perhaps more interestingly, in *Stuart*, "[t]he Chief Justice, having tried the cause in the court below, declined to give an opinion." *Id.* at 306. Most importantly, in neither case did the Justices even consider the question we are presented with, that is, whether a court comprised wholly of judges who decided the same case at a lower judicial level may hear an appeal of that lower court decision, and certainly the concurring opinion does not suggest that any such practice ever existed.

Although *Texaco* and *Swann* are not dispositive, the policies which underlie them compel the conclusion that the Hawaii Supreme Court is biased in this case. The common thread that links *Texaco* and *Swann* is the concept that no person can be compelled to litigate a controversy before a judge whose prior conduct or connection with the case makes it likely that he will have prejudged the outcome. The reason that due process does not permit a judge to hear an appeal of a case he previously tried as a lower court judge has been well stated. "Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published opinion." *Swann*, 431 F.2d at 137 (quoting an address by Walter B. Hill to the American Bar Association). The concerns reflected in *Swann* relate not only to the risk that a judge will have actually prejudged a case, but to the appearance of partiality as well. As the Supreme Court made abundantly clear in *In re Murchison*, "justice must satisfy the appearance of justice." 349 U.S. at 136, 75 S.Ct. at 625.

Here, the court which will decide in the disciplinary proceeding whether Partington provided ineffective assistance of counsel is the same body that has already determined in *State v. Clarke* that Partington did precisely that.[17] It has also issued an opinion to that effect and has

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[17] The concurring opinion suggests at one point that prejudgment "must be based upon something other than rulings in the case." Concurring op. at 133, *quoting Berger v. United States*, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921); *see also Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981) (judge's participation in prior or related proceeding not sufficient to

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reversed a murder conviction on that ground. These circumstances present an unacceptable risk of prejudgment, one that neither Partington nor any other litigant should be required to assume. They also fall far short of satisfying "the appearance of justice".

The conclusion that the Hawaii Supreme Court does not qualify as an impartial body insofar as Partington's Rule 13 proceeding is concerned finds strong support in *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Withrow*, the Court considered whether the combination of investigative and adjudicative functions in a state administrative agency violated due process. It suggested that bias or prejudgment would be established if an initial accusatory finding foreclosed, as a practical matter, a later adjudicatory finding to the contrary.[18] *Id.* at 58, 95 S.Ct. at 1470. The Court concluded that the state practice did not violate due process, because the initial investigative decision was one of probable cause, a determination that would not be logically inconsistent with a subsequent adjudicatory determination of "no violation". *Id.* at 57, 95 S.Ct. at 1469. Or, as the Court put it, a favorable second decision would not constitute an implicit admission that the first was erroneous.

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constitute bias). However, none of the cases the concurring opinion relies upon (with one exception) involves a situation in which, as here, the judges will be called upon to determine the same complex question of fact and law on which they previously reached a final determination. The one exception, *Denis v. Perfect Parts, Inc.* 142 F.Supp. 263 (D.Mass.1956), is discussed in note 20, *infra*.

[18] The majority apparently does not disagree with this suggestion. *See* Majority op. at 124, 126.

Here, the Hawaii Supreme Court has not merely made a preliminary or accusatory finding that Partington *may have* rendered ineffective assistance of counsel. Rather, it has made a finding *on the merits* that the assistance Partington rendered was so ineffective as to require the reversal of a murder conviction. Certainly, a subsequent finding by that same court in a Rule 13 proceeding that Partington had not rendered ineffective assistance of counsel would be logically inconsistent with its prior finding.[19] The Court would "implicitly be admitting error in its prior finding."[20] *Id.* 421 U.S. at 57, 95 S.Ct. at 1469.

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[19] None of this discussion is meant to minimize the problem of ineffective assistance of counsel for criminal defendants, nor to suggest that the Hawaii Supreme Court cannot fulfill its duty to supervise attorney conduct. Nevertheless, the Court cannot exercise its authority in a manner which violates the requirements of due process. A Rule 13 procedure can undoubtedly be devised which meets those requirements. *See infra* pages 146-147.

[20] The concurring opinion concludes that there would be "no *logical* inconsistency between the Supreme Court reversing the murder conviction in *Clarke* because of ineffective assistance of counsel and then finding that in the disciplinary proceeding against Partington he had explained his strategy so that the court was now satisfied that he had not breached his responsibilities as a lawyer." Concurring op. at 134 (emphasis in original). The logic of this statement escapes me. If the court determines that Partington's strategy was reasonable and that it justified his trial tactics, I do not see how it could also say that there was a sixth amendment violation. If the strategy justified the tactics, then the assistance was *not* ineffective.

The concurring opinion also concludes, without analysis, that the fact that the Hawaii Supreme Court has already reversed a murder conviction because the defendant received

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The concept of "logical inconsistency", emphasized in *Withrow*, helps distinguish this case from cases holding

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ineffective assistance from Partington does "not constitute disqualifying bias [on the part of the members of the court] because it is not the kind of aversion or hostility that a fair-minded person would be unable to set aside." Concurring op. at 132. However, the case that it relies on, *United States v. Conforte*, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), involved a type of prejudgment wholly unlike the prejudgment present in this case. In *Conforte*, the alleged bias was *personal* – the trial judge had allegedly made derogatory statements about the defendant some years prior to the time when the defendant appeared before the judge. 624 F.2d at 878-79. We held that the bias alleged was not sufficient to require recusal, and that disqualification for *personal* bias required "an animus more active and deep-rooted than an attitude of [non-racial] disapproval toward certain persons because of their known conduct." *Id.* at 881 However, the question of the depth of personal animosity required to constitute disqualifying bias bears no relationship to the question whether a court has actually prejudged the merits of the case before it because it has rendered a final decision in a previous case on the same issue it is now called upon to decide.

The only case that the concurring opinion relies on that is at all factually similar to our case is *Denis v. Perfect Parts, Inc.*, 142 F.Supp. 263 (D.Mass.1956). In that case, the district judge declined to recuse himself at the request of the defendant, although he would be called upon to determine the validity of a patent which he had declared valid in a previous case that involved the same plaintiff but a different defendant. *Id.* at 263. The Judge declined to disqualify himself, because he concluded that 28 U.S.C. § 144, the disqualification statute, "is directed to personal bias, not to previous exposure to the same or similar questions." *Id.* The judge believed that a contrary

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that a judge who initiated the proceedings may preside at the hearing on the merits.[21] For example, a judge who charges an attorney with violating Rule 11 and orders him to show cause is permitted to conduct the subsequent hearing. *See, e.g., Tom Growney Equipment, Inc. v. Shelley Irrigation Dev. Inc.*, 834 F.2d 833 (9th Cir.1987). A determination by the judge at the later hearing that Rule 11 sanctions are not appropriate would not be inconsistent with his issuance of the initial charge. The initial charge or finding is similar to one of probable cause, while the later determination on the merits is akin to one of guilt or innocence. Similarly, when a court cites an attorney for contempt, orders him to show cause, and then presides over the contempt trial, *e.g., Nilva v. United*

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result would minimize or eliminate the value of judicial experience and exposure. *Id. Denis* would thus suggest a different result than the one that I reach here. However, as the concurring opinion points out, "[s]ensibilites no doubt are changing on the question of judicial bias." Concurring op. at 133. Indeed, the author of the opinion in *Denis* has expressed considerable doubt about the decision he reached in that case. *See Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.1977). Thus, *Denis*, while never controlling on this court, cannot any longer even be considered persuasive.

[21] Although Judge Noonan does not disagree with the use of the "logical inconsistency" standard, he would seem to rely on each individual justice's view as to whether he has prejudged Partington's case. *See* Concurring op. at 134. This conclusion appears to be at odds with the prevailing notion that an objective standard is to be used. *See, e.g., Berger v. United States*, 255 U.S. 22, 33-34, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir.) *cert. denied* 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980); 28 U.S.C. § 455 (1982); *see also* Concurring op. at 134.

States, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1957), a finding of not guilty is not logically inconsistent with the fact that a charge was preferred. Another example is the issuance of a preliminary injunction by a judge who subsequently presides over a trial in which he determines whether a permanent injunction should issue. This practice is proper because the question at the hearing on the preliminary injunction is solely one of "reasonable cause"; no determination on the merits is made at that time. Thus, there is ordinarily neither the appearance nor the reality of logical inconsistency or prejudgment in any of the above cases when the merits are heard.[22]

At first glance, a more troublesome analogue is presented when a trial judge presides over a trial for the second time after his initial decision has been reversed on appeal. This practice does not generally create a risk of bias or prejudgment implicating due process concerns.[23]

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[22] It is worth noting that the judge who initiates the contempt proceedings is not always permitted to preside over them. For example, if "the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent." Fed.R.Crim.P. 42(a). *See also In re Murchison*, 349 U.S. 133, 137, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (trial for contempt during grand jury proceedings before same judge who acted as one-man grand jury violates due process because "[h]aving been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused").

[23] Of course, an appellate court may, under its supervisory powers, reassign the case on remand to a different trial judge, if it determines under the circumstances of the case that allowing the same judge to rehear the case poses an unacceptable

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See, e.g., NLRB v. Donnelly Garment Co., 330 U.S. 219, 236, 67 S.Ct. 756, 765, 91 L.Ed. 854 (1947); *United States v. Hollis*, 718 F.2d 277 (8th Cir.1983), *cert. denied*, 465 U.S. 1036, 104 S.Ct. 1309, 79 L.Ed.2d 707 (1984). However, our judicial system has built-in mechanisms that serve to protect litigants against the risk of prejudgment in such cases, and help to maintain the appearance of impartiality. When a trial judge presides over a trial after remand, intervening appellate guidance significantly minimizes the risk of bias. The trial judge is advised that his initial decision was incorrect, and receives specific guidance from the reviewing court as to the aspects of the trial which created reversible error. Usually, the trial judge is also given specific instructions as to what remedial or corrective actions should be taken in the second trial. In addition, the decision in the second trial will itself be subject to judicial review. That review also serves as an independent restraint on the trial judge, because he will be aware that evidence of bias or prejudgment on his part will lead to a second reversal.[24]

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risk of bias. *See, e.g., Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir.1987).

[24] The practical reality of retrying numerous cases after appeal virtually requires that, with appropriate safeguards, our judicial system allow the same judge who presided over the first trial to preside again after appeal. *United States v. Harris*, 458 F.2d 670, 678 (5th Cir.) (" 'used' judges must simply be recycled" to avoid problem of no judge in a particular venue being able to hear a litigant's case), *cert. denied*, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). Neither the courts generally nor Hawaii courts in particular face a comparable practical problem with respect to the adjudication of disciplinary cases.

None of the procedures which serve to eliminate or reduce the risk of prejudgment when a trial judge rehears a case following reversal or remand are applicable in Rule 13 proceedings. Under Rule 13, there is no superior authority that will have informed the supreme court that its initial decision was incorrect prior to the time it hears the issue for the second time; no higher court will have explained to the Hawaii Supreme Court the nature of its errors in the initial proceedings or provided it with guidance as to those errors. Nor will the supreme court have had the benefit of specific instructions as to how to conduct the second proceeding. While remand to a trial court occurs because that court's initial decision has been found to be incorrect and has been reversed, no comparable events will have occurred here. To the contrary, the disciplinary proceedings will take place here because the Hawaii Supreme Court's determination of ineffective assistance has *not* been vacated or set aside by a higher court. Equally important, the supreme court's determination in the Rule 13 proceedings will be final, with no right of appeal to a superior judicial body.[25]

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[25] The concurring opinion suggests that our current en banc practice also presents a troublesome analog. Concurring op. at 131-133. However, that circumstance is wholly different from the one with which we are now confronted. When a circuit court sits en banc, the court *rehears* the case at issue, just as the original panel may. The en banc judges do not, as the Hawaii Supreme Court under Rule 13 is required to do, decide a complex issue of fact and law on which the court has already reached a *final* determination in a *prior* case. The practice of granting a rehearing in a pending case poses none of the problems presented by a court requiring a party to submit to it for decision an issue on which the court has already rendered a final decision adverse to that party.

For the reasons discussed above, I cannot agree that Partington must show more than the fact that the Hawaii Supreme Court is biased on the merits of the disciplinary proceeding. Nor can I agree that Partington has failed to establish the existence of that bias. In my opinion, the court's prior determination in *State v. Clarke* that Partington provided ineffective assistance would "give[ ] fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *United States v. Haldeman*, 559 F.2d 31, 136 (D.C.Cir.1976) *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). The Supreme Court has warned us to "be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow*, 421 U.S. at 54, 95 S.Ct. at 1468. The majority fails to consider sufficiently the nature of the triggering determination in Rule 13 proceedings, and thus gives short shrift to the very real problem of prejudgment the rule presents. The Supreme Court has held that, if a state administrative agency is biased, *Younger* abstention is inappropriate even if state "judicial review, *de novo* or otherwise, would be forthcoming at the close of the administrative proceedings." *Gibson*, 411 U.S. at 577, 93 S.Ct. at 1697 (footnote omitted). The same conclusion holds true *a fortiori* where, as here, the biased decision of a court will not be subject to *any* review.[26]

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[26] The majority opinion contends that Hawaii's Rule 13 disciplinary procedure is "strikingly similar" to the New Jersey disciplinary proceeding which the Supreme Court held, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), provided a

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III

RECUSAL

In concluding that Partington will be able to bring his claims before an impartial tribunal, the majority does not determine whether the justices of the Hawaii Supreme Court have, as a *practical* matter, prejudged his claim; nor does it consider whether disciplinary proceedings before those justices would give the requisite appearance of impartiality. *See* Majority op. at 120. Rather, its conclusion is based entirely on Partington's supposed ability to obtain the recusal under Haw.Rev.Stat. § 601-7(b) (1985) of all five of the justices of the court.[27] Majority op. at

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charged attorney with an adequate opportunity to raise his constitutional claims. Majority op. at 121. However, any "similarity" between the two systems is at most superficial, and in any event irrelevant to the question of prejudgment.

Under the New Jersey attorney disciplinary system, a local Ethics Committee is authorized to receive complaints about attorney misconduct. It then makes an initial determination whether an attorney should be disciplined for unethical conduct. 102 S.Ct. at 2518. If the Committee determines that disciplinary action is warranted, it prepares a presentment for the Disciplinary Review Board. *Id.* at 2518-19. The Review Board then decides what disciplinary action, if any, is warranted. The New Jersey Supreme Court's *first* involvement with the proceedings is when it reviews the Review Board's decision. *Id.* at 2519.

[27] Although the majority refers to Partington's ability to seek recusal of "*certain* members of the Supreme Court [who] may be personally biased against him . . . by virtue of their finding of ineffectiveness of counsel in *State v. Clarke*," Majority op. at 127 (emphasis added), the opinion in *Clarke* shows that *all* of the justices found that Partington's assistance was ineffective. ER 158-59.

126-128. In short, the majority appears to assume that some group of judges other than the sitting supreme court justices will hear Partington's case. Once again the majority does not discuss the legal issue involved, that is, whether Hawaii's recusal statute is applicable here; this time it simply asserts, *ex cathedra,* that it is.

Hawaii law provides for recusal of the entire court "[w]hen necessary." Haw.Rev.Stat. § 602-10. On its face, this language would seem to support the majority's position. But recusal statutes are generally addressed to claims of bias in individual cases, that is, the problem of alleged bias on the part of some or all of the justices arising from the peculiar facts of an individual case or group of related cases. *Cf.* C. Wolfram, *Modern Legal Ethics* 982-99 (1986) (discussion of disqualification of judges for interest or bias contains no mention of types of bias other than individual). Rule 13 presents a very different problem than is usually addressed under recusal statutes. Under Rule 13, prejudgment is not the exceptional case, arising only under unusual circumstances. Rather, the conflict the Hawaii Supreme Court justices are confronted with in Partington's case is the *inevitable* result of the way the rule is structured. That structure ensures that prejudgment will be endemic in disciplinary cases. Far from being a random occurrence during a particular Rule 13 proceeding, prejudgment is the institutional norm.

Under Rule 13, the Hawaii Supreme Court makes the final determination in all disciplinary proceedings as to whether an attorney provided ineffective assistance of counsel. The event that triggers the Rule 13 proceedings is a determination, made in a criminal proceeding, by the supreme court or the intermediate appellate court or both

that the attorney did in fact provide ineffective assistance.[28] The supreme court may have been the first court to make that determination in the criminal proceeding or it may have affirmed the finding of the intermediate court.[29] Wherever or however the determination of ineffectiveness was made in the criminal proceeding, Rule 13 vests the Hawaii Supreme Court with the authority to make the subsequent ineffectiveness determination in the disciplinary proceedings.

As already noted, the majority contends that recusal of all of the Hawaii Supreme Court justices will solve whatever bias or prejudgment problem Partington may face. However, the majority's "solution" would not apply to Partington's case only. It would require the recusal of every member of the supreme court in every case which was initiated because the supreme court had made or affirmed the triggering ineffectiveness finding. *All* such cases would be heard by judges who are not sitting members of the Hawaii Supreme Court. Such a procedure

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[28] Disciplinary proceedings are instituted whenever such a determination is made and the criminal conviction is reversed. Haw.S.Ct.R. 13. Conceivably, in rare instances the reversal of a conviction on the ground of ineffective assistance of counsel could originate in the trial court. However, in such cases, there is still a reasonable possibility that the determination will subsequently be affirmed (or reversed) by the intermediate appellate court, the supreme court, or both. Accordingly, there is no need to consider these cases separately, and they are subsumed within the discussion contained in the text.

[29] Of course, where the intermediate appellate court makes the determination in the criminal proceeding and the decision is not reviewed by the supreme court, no due process issue is presented by the provisions of Rule 13.

would be directly contrary to the disciplinary system the Hawaii Supreme Court actually enacted, a disciplinary system which contemplates a final determination by the supreme court in *all* cases. The majority's assertion that the recusal statute is applicable here is simply incompatible with the language and intent of Rule 13.

A Rule 13 system could easily have been devised under which the supreme court would make the determination of ineffective assistance of counsel in a disciplinary proceeding if the original finding of ineffectiveness had been made in an unappealed decision of the intermediate appellate court, and the intermediate appellate court would make the disciplinary determination if the supreme court had originated the earlier ineffective assistance finding.[30] But the Hawaii Supreme Court chose not to enact such a system. Instead, it chose to make itself the final judge of whether an attorney had provided ineffective assistance in all cases – those in which it had made or affirmed the earlier determination that the attorney was in fact ineffective as well as those in which only the intermediate appellate court had made such a determination. Rule 13 explicitly provides that the disciplinary proceeding be adjudicated by the supreme court, not by appellate court judges or retired supreme

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[30] If the intermediate appellate court had made the initial ineffectiveness finding and the Hawaii Supreme Court had affirmed, neither the supreme court justices nor the appellate court judges who participated in the criminal proceedings could be involved in the disciplinary case. However, other active appellate court judges as well as retired supreme court justices, retired appellate court judges, or active or retired circuit court judges would be eligible, if authorized by a revised Rule 13.

court justices. If, when it adopted rule 13, the Hawaii Supreme Court had intended that intermediate court judges or retired supreme court justices adjudicate the disciplinary proceedings which had been initiated because of a finding made by the supreme court, it would certainly have included a provision to that effect in the text of the rule.[31]

It is clear that the Hawaii Supreme Court did not intend the recusal statute to be applicable in cases such as Partington's because application of the statute to such cases would do precisely what the court refused to do when it enacted Rule 13. It would require that disciplinary proceedings arising out of reversals ordered by the supreme court, or out of cases in which the supreme court upheld a reversal ordered by a lower court, be adjudicated by a group of judges who are not active members of the court. The majority errs in attempting to save Rule 13 by presuming the applicability of Hawaii's recusal statute.[32] The proper course would be to

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[31] For the same reason, it would not be reasonable to suggest that the court had the recusal statute in mind when it drafted Rule 13, and that it therefore expected retired justices or active circuit judges, *see* Haw.Rev.Stat. § 602-10, to hear those disciplinary cases which result from criminal proceedings which have previously reached the supreme court level. That class of cases constitutes far too significant a part of the potential pool to have been overlooked by the court or excluded *sub silentio* from the regular procedure.

[32] The Supreme Court has held that the ability to seek recusal is sufficient to protect due process requirements. *Kugler v. Helfant*, 421 U.S. 117, 130-31, 95 S.Ct. 1524, 1533-34, 44 L.Ed.2d 15 (1975). In *Kugler*, the Supreme Court affirmed the

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invalidate the rule and permit the Hawaii Supreme Court to reenact a version that does not offend due process.

IV

CONCLUSION

Certainly, judges are entitled to a presumption of absence of bias, *see Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982), as well as one of integrity and honesty. *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. They are also entitled to a presumption that they will follow their duty to "be unswayed by partisan interests, public clamor, or fear of criticism." Haw.S.Ct.R. 8.5(a)(5), *incorporating* Code of Judicial Conduct, Canon 3(A)(1). But such a presumption "does not, of course, preclude a court from determining from the special facts

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district court's dismissal of a complaint on the basis of *Younger*, emphasizing that recusal would solve any due process problem that might arise from the possibility of bias on the part of individual members of the New Jersey Supreme Court. *Id.* *Kugler* involved an individual instance of bias, not the systemic bias present here. Because Rule 13 contemplates that the Hawaii justices will determine the question of ineffective assistance of counsel under that rule and not that they will all be recused from hearing such cases when the triggering determination has been made by the Hawaii Supreme Court, recusal is not an available option here. Thus, *Kugler* is inapplicable. In addition, this court has held that a plaintiff's failure to utilize state disqualification procedures will prevent us from making a determination whether his case fits the bias exception to *Younger*. *Flangas v. State Bar of Nevada*, 655 F.2d 946, 950 (9th Cir.1981). However, *Flangas*, like *Kugler*, involved an individual instance of bias to which the state recusal statute was clearly applicable.

and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58, 95 S.Ct. at 1470. This is just such a case. Under Rule 13, the Hawaii Supreme Court would be called upon to determine whether Partington rendered ineffective assistance of counsel, despite the fact that it has previously determined, in reversing a murder conviction, that he did precisely that. While I have no doubt that the justices of the Hawaii Supreme Court would attempt to comply with their duty to be impartial, the risk of prejudgment on the part of the court is too great. So, too, is the price the courts would pay for failing to preserve the appearance of justice.

The majority's suggestion that Partington must now present his arguments to a tribunal that has prejudged the merits of the disciplinary proceedings because he has not shown that the tribunal is biased on the issue of whether it is biased, misconceives the law of abstention. Partington has shown all that he need show in order to obtain a federal court injunction – he has shown that the state tribunal has prejudged the merits of the disciplinary proceedings. *See Gibson*, 411 U.S. at 577-78, 93 S.Ct. at 1697. I see no legal or practical reason for forcing Partington to first present his claims to the Hawaii Supreme Court.

Although the majority posits recusal of all of the justices as a possible solution to the prejudgment problem, it offers no support for the assumption that Hawaii's general recusal statute is applicable. In fact, the structure of Rule 13 compels the conclusion that this remedy is simply not available here. Rule 13 explicitly requires that the Hawaii Supreme Court adjudicate all cases arising

under the rule, not that the determination be made by an entirely different group of judges whenever the initial determination was made or affirmed by the supreme court.

For these reasons, the Hawaii Supreme Court simply cannot be said to provide Partington with an unbiased forum insofar as the disciplinary proceedings are concerned. Accordingly, *Younger* abstention is inappropriate.[33] I would reverse the district court's decision and remand the case to that court with instructions to enjoin the Rule 13 proceedings.

SANCTIONS

While I agree with the majority that sanctions against Chang and Gedan are appropriate, I cannot agree that Rule 11 is a proper basis for imposing them. Certainly, Rule 11 was not the basis the Seventh Circuit relied upon in *Meeks v. Jewel Cos., Inc.*, 845 F.2d 1421, 1422 (7th Cir.1988), a case the majority cites as precedent for its sanctioning of Chang and Gedan. The Seventh Circuit has made it abundantly clear that Rule 11 does not apply to proceedings before courts of appeals. *See, e.g., Leigh v. Engle*, 858 F.2d 361, 370 n. 5 (7th Cir.1988), *cert. denied*,

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[33] Because the Hawaii Supreme Court is biased for the reasons explained above, it is not necessary to decide whether it is also biased as to Partington's equal protection claim. Nevertheless, the April 27, 1987 letter to Partington from the Chief Justice strongly suggests that the Court has prejudged that issue as well. *See* note 11 *supra* and ER 446 (stating reasons that Rule 13 need not be applied to prosecuting attorneys as well as to defense attorneys).

___ U.S. ___, 109 S.Ct. 1528, 103 L.Ed.2d 833 (1989); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 306 n. 6 (7th Cir.1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir.1988).

The majority attempts to avoid this problem by stating that, unlike the Seventh Circuit, this circuit has adopted Rule 11 for proceedings before this court. However, the cases cited by the majority, *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir.1988); *Rockwell International Credit Corp. v. United States Aircraft Insurance Group*, 823 F.2d 302, 304-05 (9th Cir.1987); and *In re Curl*, 803 F.2d 1004, 1007 (9th Cir.1986), when properly analyzed, do not stand for this broad proposition. Rather, in each of these cases, the objectionable conduct for which the attorney was sanctioned occurred in the district court.[34] Here, in contrast, the sanctionable conduct took place exclusively in the court of appeals: Chang and Gedan filed a frivolous motion for sanctions against Partington for bringing this appeal. I do not believe that we can properly adopt Rule 11 for appellate proceedings through the exercise of our decision making function. Rule 11 is applicable to actions taken in the district courts not the bankruptcy courts, *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir.1987); Fed.R.Civ.P. 81(a)(1), or the courts of appeals. *Leigh; Borowski; Hays*. If a rule similar or identical to Rule 11 is to be made applicable to federal appellate courts generally, an amendment to the Federal Rules of Appellate Procedure will be required. If, on the other hand, a

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[34] While *In re Curl* is at best ambiguous, it appears that the principal conduct the attorney was sanctioned for in that case was the filing in the district court of a frivolous notice of appeal.

judge of this court believes that our court should adopt such a rule for ourselves, he should request our Advisory Committee on Rules to act. However, even if we could extend Rule 11 to appellate proceedings, it would be unwise to do so. The satellite litigation we would be inviting is not worth the candle.

Of course, this still leaves the question of what the proper basis for our imposition of sanctions against Chang and Gedan should be. While *Meeks* did not make clear what basis the Seventh Circuit relied upon to grant sanctions, there are several options available to us: Fed.R.App.P. 46(c); 28 U.S.C. § 1927; or our inherent powers. Unwarranted sanctions motions serve to multiply proceedings unnecessarily and to harass one's opponent. Because I believe that Chang and Gedan's filing of a motion for sanctions against Partington for bringing this appeal was unreasonable and vexatious, I would impose sanctions pursuant to 28 U.S.C. § 1927.

RULES OF THE SUPREME COURT OF THE STATE OF HAWAII

As Amended April 16, 1984
Effective June 1, 1984*
With Further Amendments as Noted

Rule 2. DISCIPLINARY RULES.

2.1. Jurisdiction. Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the supreme court and the Board hereinafter established.

Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any voluntary bar association from censuring a member or suspending or expelling a member from membership in the association.

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* Large portions of the former Rules of the Supreme Court were deleted and superseded by the Order Adopting Hawaii Rules of Appellate Procedure and Superseding Certain Other Rules filed April 16, 1984, effective June 1, 1984. Pursuant to that Order, remaining rules have been renumbered.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders.)

2.2. Grounds for Discipline.

(a) The Code of Professional Responsibility, attached hereto as Exhibit A, as amended by this court shall govern the conduct of all attorneys subject to discipline under this rule.

(b) Acts or omissions by an attorney which violate the Code of Professional Responsibility shall constitute misconduct and shall be ground for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. Conviction of a crime shall similarly be ground for discipline as set forth in Rule 2.13.

(Renumbered September 1984.)

2.3. Types of Discipline.

(a) Discipline may consist of:

(1) Disbarment by the supreme court; or

(2) Suspension by the supreme court for a period not exceeding five years; or

(3) Public censure by the Supreme Court; or

(4) Public reprimand by the Disciplinary Board with the consent of the respondent; or

(5) Private reprimand by the Disciplinary Board with the consent of the respondent; or

(6) Private informal admonition by Disciplinary Counsel.

(b) Where a respondent has, with the written concurrence of the Director of the Attorneys and Judges Assistance Program, proposed a program of monitoring of the respondent's efforts toward rehabilitation from "substance abuse" (as that term is defined in Rule 16.1(a) of this court), this court or the Board may impose such a monitoring program. The monitoring program, which shall in all cases be supervised by the Director of the Attorneys and Judges Assistance Program, may be in lieu of or in addition to a disciplinary sanction. The duration and conditions of monitoring shall be stated in the final order issued by this court or the Board. Violation of any conditions of monitoring shall result in the imposition of disciplinary sanctions, but only to the extent set forth in the order establishing the monitoring program.

(c) Restitution and/or payment of costs (exclusive of attorney's fees) may also be ordered by this court, or, if consented to by an attorney, may be included among the terms of a public or private reprimand by the Board.

(Renumbered September 1984; amended November 8, 1991, effective November 8, 1991.)

2.4. Disciplinary Board.

(a) The supreme court shall appoint a board to be known as the "Disciplinary Board of the Hawaii Supreme Court" (hereinafter referred to as the "Board") which shall consist of eighteen members, and shall include the offices of Chairperson and Vice-Chairperson, each of

which shall be nominated and appointed separately. All appointments shall be made from a list of nominees submitted by the governing Board may, but need not, also be members of the Disciplinary Board.

(b) All members shall be appointed to staggered three-year terms; however, to maintain a Board with staggered terms, initial appointments may be for less than three years. The Board shall act only with the concurrence of seven or more members. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(c) Board members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. If, in any given case, it shall become necessary for the continuation of a case, or the orderly operation of the Board, the supreme court may appoint, for that case only, one or more ad hoc members as it deems necessary. Each ad hoc member shall fulfill all the responsibilities of a Board member.

(d) Periodically, the Chairperson shall designate at least two Board members to review the proposed decisions of the Disciplinary Counsel, as mentioned in subsection 2.7 hereof.

(e) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Disciplinary Rules, including the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such

action with respect thereto as shall be appropriate to effectuate the purpose of these Disciplinary Rules.

(2) To appoint a Chief Disciplinary Counsel, and such Assistant Disciplinary Counsel and staff of employees and/or volunteers as may from time to time be required to properly perform the functions hereinafter prescribed. The Chief Disciplinary Counsel and Assistant Disciplinary Counsel are hereinafter referred to as "Counsel."

(3) To appoint from time to time, and establish the terms of office of, an appropriate number of hearing committees.

(4) To approve assignments made annually by the Chairperson for rotation of members of the Board to review for stated periods all recommended dispositions by Counsel and to authorize changes in such assignments from time to time necessitated by unforeseen circumstances.

(5) To adopt rules of procedure governing the Board and hearing committees which are not inconsistent with these rules.

(6) To adopt and publish advisory opinions interpreting the Code of Professional Responsibility.

(7) To develop in consultation with the Board of Directors of the Hawaii State Bar an annual budget for the operation of the Office of Disciplinary Counsel and performing the functions of the Board.

(8) To receive from the Bar funds for the annual budget of the Board; to prepare and maintain appropriate accounting records showing the receipt and disposition of

those funds, which records shall be subject to audit; and to prepare an annual budget for the expenditure of those funds.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.5. Hearing Committees.

(a) Each hearing committee shall consist of three members, at least two of whom shall be members of the bar of this state. The Board shall designate the terms of its members and the chairperson for each committee. Each committee shall act only with the concurrence of a majority of its members. Committee members shall refrain from taking part in any proceeding in which a judge, similarly situated, would be required to abstain. Members shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to the performance of their duties.

(b) Hearing committees shall have the power to conduct hearings in formal disciplinary proceedings and on petitions for reinstatement of disbarred or suspended attorneys, upon assignment by the Chairperson of the Board, and to submit their findings and recommendations, together with the record of the proceeding, to the Board.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.6. Disciplinary Counsel.

(a) Counsel shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

(b) Counsel shall have the power and duty:

(1) With the approval of the Board, to employ and supervise staff and volunteers needed for the performance of his or her duties.

(2) To investigate all matters involving alleged misconduct called to his or her attention whether by complaint or otherwise.

(3) To dispose, subject to review by members of the Board assigned by the Chairperson, of all matters involving alleged misconduct by dismissal, private informal admonition or the institution of formal disciplinary proceedings before a hearing committee. Except in matters requiring dismissal because the complaint is frivolous on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Counsel until the accused attorney shall have been afforded the opportunity to state his or her position with respect to the allegations against him or her.

(4) To file with the supreme court certificates of conviction of attorneys for crimes.

(5) To prosecute all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing committees, the Board and the supreme court.

(6) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, to examine witnesses and to submit evidence, if any, relevant thereto.

(7) To maintain permanent records of all matters processed and the disposition thereof.

(8) To assist members of the public in preparation of requests for investigation.

(9) To perform such other duties and provide such reports as the Board shall direct.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.7. Procedure.

(a) Investigation. All investigations, whether upon complaint or otherwise, shall be conducted under the supervision of Counsel. Upon the conclusion of an investigation, Counsel shall recommend dismissal, informal admonition of the attorney concerned or the institution of formal disciplinary proceedings before a hearing committee. Counsel's recommendation shall be reviewed by one of the two members of the Board assigned for that purpose. If the initial reviewing member of the Board approves Counsel's recommendation, it shall be implemented. If the reviewing member of the Board disapproves Counsel's recommendation, Counsel may request further review by the other reviewing member of the Board. In the event of such second review of Counsel's

recommendation, the decision by the second reviewing member of the Board shall be final. The member or members of the Board who review Counsel's recommendation shall be disqualified in any formal disciplinary proceedings in relation to the same alleged misconduct.

(b) Formal Hearing. Formal disciplinary proceedings shall be instituted by Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent in accordance with Rule 2.11(a). Notwithstanding Rule 2.22, if at the time the petition is served, the respondent is engaged in the act of the practice of law as a part of a firm, partnership, corporation or governmental entity or other group, Counsel shall provide a notice to the respondent's employer of the fact that formal disciplinary proceedings have been filed with the Board. The respondent shall serve his or her answer upon Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Board Chairperson. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairperson to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect. Following the service of the answer or upon failure to answer, the matter shall, unless the provisions of (d) below apply, be assigned by the Chairperson to a hearing committee or officer. The hearing committee or officer receiving the assignment shall

serve a notice of hearing upon Counsel and the respondent, or the respondent's counsel, stating the date, time, and place of the hearing. At every hearing wherein factual issues are to be resolved, the respondent shall have a full opportunity to confront and cross-examine such witnesses presented by Counsel and to present evidence on his or her own behalf. The hearing committee or officer shall, in every case, submit a report containing findings and recommendations, together with a record of the proceedings, to the Board within 30 days after the conclusion of the hearing. The findings of the hearing committee or officer shall be supported by clear and convincing evidence. The hearing committee or officer shall not be bound by the formal rules of evidence, but shall admit only trustworthy evidence. The hearing committee or officer shall not rely upon any evidence outside the formal record in reaching a decision.

(c) **Review by Board and Supreme Court.** Upon receipt of a report from a hearing committee or officer, the Board shall set the dates for submission of briefs and for oral argument before the Board. The Board shall promptly either affirm or modify the recommendation of the hearing committee or officer, remand the matter for further proceedings before the hearing committee or officer, or dismiss the petition. In the event the Board determines that the proceeding shall be concluded by private or public reprimand, such reprimand shall be imposed, with the consent of the respondent, in accordance with procedures established by the Board. Unless the Board shall dismiss or remand the petition or the matter is concluded by private or public reprimand with the consent of the respondent, the Board shall promptly submit a

report containing its findings and recommendations, together with the entire record, to the supreme court. After the filing of such report, a copy thereof shall be served on the respondent in accordance with Rule 2.11(b). If the respondent objects to the report, then within 20 days after being served with a copy of the report, the respondent shall file an opening brief pursuant to the rule governing civil appeals. Other briefs may be filed and oral argument may be had as therein provided, except that the time for filing of an answering brief shall be 20 days after Counsel has been served with a copy of the respondent's opening brief. Upon conclusion of the proceedings, the court shall promptly enter an appropriate order.

(d) Elimination or Suspension of Hearing Proceedings. All proceedings before the hearing committee or officer shall be eliminated or suspended (1) where the respondent has filed no answer (and the charges have thus been deemed admitted) because, after due and diligent effort by Counsel, the respondent cannot be located for personal service and does not receive registered or certified mail at any of his or her addresses last known to Counsel; or (2) where Counsel and the respondent at any time subsequent to the filing of a petition file with the Board a stipulation setting forth an admission by the respondent of the facts deemed relevant to a determination of the matter, the disciplinary violations which serve as grounds for discipline, and an agreement as to the recommended form of discipline which should be imposed upon the respondent based upon the admitted violations. The entire record in the case shall thereupon

be transmitted directly to the Board for review in accordance with (c) above. The parties may request that the record be supplemented by documentary exhibits. In any event, the Board may accept a request by the parties that the submission of briefs and/or argument before the Board be waived. In the case of a stipulation filed by the parties, neither the Board nor the supreme court shall be bound to accept the parties' stipulated factual and legal agreements or recommended disposition, and the Board or the court may either decide the matter based upon the factual admissions set forth in the parties' stipulation or may remand the matter for further proceedings before a hearing committee as outlined in (b) above.

(Renumbered September 1984; amended March 7, 1986, effective March 7, 1986; further amended September 22, 1988, effective September 22, 1988; further amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended January 11, 1991, effective January 11, 1991; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992.)

2.8 Immunity. Complaints submitted to the Board or Counsel or testimony given with respect thereto shall be absolutely privileged and no lawsuit predicated thereon may be instituted. Members of the Board, members of the hearing committees, Counsel, staff, volunteers, experts appointed pursuant to Rule 2.19, and trustees appointed pursuant to Rule 2.20 shall be immune from suit and liability for any conduct in the course of their official duties.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended May 7, 1990, effective May 7, 1990.)

2.9. Refusal of Complainant to Proceed, Compromise, etc. Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement, compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

(Renumbered September 1984.)

2.10. Matters Involving Relating Pending Civil or Criminal Litigation. Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Board in its discretion, for good cause shown.

(Renumbered September 1984.)

2.11. Service.

(a) Service upon the respondent of the petition or order to show cause in any disciplinary, disability, or trustee proceeding shall be made by personal service by any person authorized by the Chairperson of the Board, except that in the event the respondent cannot be found within the state or has departed therefrom, service shall be made by registered or certified mail at the respondent's address shown in his or her registration statement filed pursuant to Rule 17(d) or other last known address.

(b) Service of any other papers or notices required by these rules shall be made in accordance with Rule 5 of the Hawaii Rules of Civil Procedure.

(Renumbered September 1984; amended July 3, 1989, effective July 3, 1989; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended May 7, 1990, effective May 7, 1990; further amended February 7, 1992, effective February 7, 1992.)

2.12. Power to Subpoena Respondents and Witnesses; Pretrial Proceedings. Any member of a hearing committee or any hearing officer, in matters before it or them, and Counsel, in matters under investigation by him or her, may administer oaths and affirmations, and compel by subpoena the attendance of the respondent and witnesses and the production of pertinent books, papers and documents. A respondent may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents before a hearing committee or officer after formal disciplinary proceedings are instituted. Writs of subpoena shall be issued in blank by the clerk of this court upon application by any member of a hearing committee or any hearing officer, Counsel or the respondent. This court may, upon proper application pursuant to HRAP Rule 27, enforce the attendance and testimony of the respondent and may, as set forth in Rule 2.12A, immediately suspend the respondent from the practice of law for the failure to comply with any lawful demand of this court, hearing committee or officer, or Counsel made in connection with any investigation, hearing, or disciplinary proceedings. Upon application pursuant to HRAP Rule 27, this court may also enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in criminal cases in the circuit courts.

There shall be no discovery proceedings except upon the order of the Chairperson of the Board for good cause shown.

At the discretion of the hearing committee or officer, a conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the officer or the chairperson of the committee or any member of the committee designated by its chairperson.

(Renumbered September 1984; amended April 4, 1988, effective April 4, 1988; further amended October 27, 1989, effective November 1, 1989, subject to transitional orders; further amended February 7, 1992, effective February 7, 1992.)

2.12A. Failure to Cooperate.

(a) An attorney who is the subject of an investigation by Counsel, or who is the subject of a disciplinary proceeding pending before a hearing committee, the Disciplinary Board, or this court, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of a failure to cooperate with the investigation or disciplinary proceeding. Such a finding shall be based upon the attorney's default in responding to the petition or notice filed by Counsel, or the attorney's failure to submit a written response to pending allegations of professional misconduct, or to comply with any lawful demand of this court, the hearing committees, or Counsel made in connection with any investigation, hearing, or disciplinary proceeding, including failure to comply with a subpoena issued under Rule 2.12.

(b) Upon the filing with this court of a petition approved by the Board Chairperson or his or her designee on the Board, an order shall be issued directing the attorney to appear within ten days of the service of the order, and inform the court as to why the attorney should not be immediately suspended. Service upon the attorney shall be made pursuant to Rule 2.11(a). The suspension shall be made upon this court's finding that the attorney has failed to cooperate, as outlined in (a) above. The court shall briefly state its reasons for its order of suspension, which shall be effective immediately and until such time as the disciplinary proceedings before the Disciplinary Board have been concluded, and until further order of this court.

(c) In all cases where the petition described in (b) above is served in any manner other than personally, and the attorney so served does not appear, an application may be made by such attorney to the chief justice at any time within one year after the rendition of the final order of suspension, and upon good cause shown and upon such terms as may be deemed just by the chief justice, such attorney shall be allowed to defend himself against such charges.

(Added April 4, 1988, effective April 4, 1988; amended February 7, 1992, effective February 7, 1992.)

2.13. Attorneys Convicted of Crimes.

(a) Upon the filing with this court of a certificate of a clerk of court demonstrating that an attorney has been convicted (certificate of conviction) of a crime which is, or if it had been committed in Hawaii would have been a

felony or which involves dishonesty or false statement, this court shall enter an order immediately restraining the attorney from engaging in the practice of law, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the court may set aside such order restraining the attorney from engaging in the practice of law when it appears to be in the interest of justice so to do. An order restraining an attorney from the practice of law shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall so order. Upon being informed that an attorney has been convicted of a crime above described. Counsel shall obtain a certificate of the conviction and file the same with the Board and with the clerk of this court.

(b) The final conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him or her based upon the conviction. For purposes of this rule, a judgment of conviction is deemed final when the availability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or if filed the petition has been denied or the judgment of conviction has been affirmed.

(c) Upon the receipt of a certificate of conviction of an attorney of a crime described in (a) above, whether or not the attorney shall be restrained from the practice of

law, this court shall refer the matter to the Board for the institution of a formal proceeding in which the sole issue to be determined shall be the extent of the discipline to be imposed, provided that a disciplinary proceeding so instituted shall not be brought to hearing until the judgment of conviction is final, unless the respondent shall so request.

(d) Immediately upon the filing with this court of a certificate demonstrating that the underlying conviction for a crime has been reversed, any order entered under the provisions of (a) above restraining the attorney from the practice of law shall be vacated, any formal proceeding then pending against the attorney found solely upon such conviction shall be terminated and any discipline imposed in any such formal proceeding shall be vacated, but the reversal of the conviction shall not terminate or affect any formal proceeding previously or thereafter instituted founded upon alleged misconduct by the attorney, whether or not involving the same facts alleged to constitute the crime or offense of which the attorney was convicted.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.14. Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution.

(a) An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of grounds for his or her discipline may consent to disbarment, but only by delivering to the Board an affidavit stating that he or she desires to consent to disbarment and that:

(1) His or her consent is freely and voluntarily rendered; he or she is not being subjected to coercion or duress; he or she is fully aware of the implications of submitting his or her consent;

(2) he or she is aware that there is a presently pending investigation into, or proceeding involving, allegations that there exist grounds for his or her discipline, the nature of which he or she shall specifically set forth;

(3) he or she acknowledges that the material facts so alleged are true; and

(4) he or she submits her consent because he or she knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, he or she could not successfully defend himself or herself.

(b) Upon receipt of the required affidavit, the Board shall file it with this court and this court shall enter an order disbarring the attorney on consent.

(c) The order disbarring the attorney on consent shall be a mater of public record. However, the affidavit required under the provisions of (a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court or as otherwise allowed by these rules.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.15. Reciprocal Discipline.

(a) Any attorney disciplined by any foreign or domestic jurisdiction, whether state, federal, or local, has

a duty to notify Counsel promptly of the imposition of that disciplinary action. In addition, the disciplined attorney shall promptly obtain a certified copy of the order imposing that discipline and file it with this court and the Board.

(b) Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this state has been disciplined in another jurisdiction, this court shall forthwith issue a notice directed to the attorney containing: (1) a copy of said order from the other jurisdiction; and (2) an order directing that the attorney inform the court, within 30 days from service of the notice, of any claim by the attorney that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor.

(c) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this court shall impose the identical discipline unless Counsel or the attorney demonstrates, or this court finds that upon the face of the record upon which the discipline is predicated it clearly appears, (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or (3) that the misconduct established warrants substantially different discipline in this state. Where this court determines that any of said elements exist, this court shall enter such other order as it deems appropriate.

(d) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

(Renumbered September 1984.)

2.16. Disbarred or Suspended Attorneys.

(a) A disbarred or suspended attorney shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of his or her disbarment or suspension and his or her consequent inability to act as an attorney after the effective date of his or her disbarment or suspension and shall advise said clients to seek legal advice elsewhere.

(b) A disbarred or suspended attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, each of his or her clients who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his or her disbarment or suspension and consequent inability to act as an attorney after the effective date of his or her disbarment or suspension. The notice to be given to the client shall advise the client of the desirability of the prompt substitution of another attorney or attorneys in his or her place.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred

or suspended attorney to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(c) Orders imposing suspension or disbarment shall be effective 30 days after entry. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order and its effective date he or she may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(d) Within ten days after the effective date of the disbarment or suspension order,the disbarred or suspended attorney shall file with this court an affidavit showing: (1) that he or she has fully complied with the provisions of the order and with these rules; (2) all other state, federal and administrative jurisdictions to which he or she is admitted to practice; and (3) that he or she has served a copy of such affidavit upon Counsel. Such affidavit shall also set forth the residence or other address of the disbarred or suspended attorney where communications may thereafter be directed to him or her.

(e) The Board shall cause a notice of the suspension or disbarment to be published in a newspaper of general circulation in the judicial circuit in which the disciplined attorney maintained his or her practice.

(f) The Board shall promptly transmit a certified copy of the order of suspension or disbarment to all judges of the State of Hawaii, and the administrative judge of each judicial circuit shall make such further order as he or she deems necessary to fully protect the rights of the clients of the suspended or disbarred attorney.

(g) A disbarred or suspended attorney shall keep and maintain records of the various steps taken by him or her under these rules so that, upon any subsequent proceeding instituted by or against him or her, proof of compliance with these rules and with the disbarment or suspension order will be available. Proof of compliance with these rules shall be a condition precedent to any petition for reinstatement.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.17. Reinstatement.

(a) No suspended or disbarred attorney may resume practice until reinstated by order of this court except as provided in Rule 17(d).

(b) An attorney who has been disbarred may not apply for reinstatement until the expiration of at least five years after the effective date of the disbarment and shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements

imposed by the court, which may include successful completion of requirements for passing the bar examination.

An attorney suspended from practice for one year or less who has complied with the suspension order and has paid all required fees shall be reinstated by order of the court at the end of the period of suspension by filing with the court and serving upon Counsel an affidavit to that effect. An attorney suspended from practice for more than one year may not apply for reinstatement until the expiration of at least one-half of the period of suspension. An attorney suspended from practice for more than one year shall not be reinstated unless he or she can show proof of the following by clear and convincing evidence: rehabilitation, fitness to practice law, competence and compliance with all applicable disciplinary or disability orders and rules, and compliance with any other requirements imposed by the court, which may include the successful completion of requirements for passing the bar examination.

(c) Petitions for reinstatement by a disbarred or suspended attorney shall be filed with the Board and served upon Counsel. Upon receipt of the petition, the Board shall refer the petition to a hearing committee. The hearing committee shall promptly schedule a hearing. At the conclusion of the hearing, the hearing committee shall promptly submit to the Board a report containing its findings and recommendations, together with the record of the proceedings before it. The Board shall review the report of the hearing committee and the record and shall submit a report containing its findings and recommendations, together with the record, to this court, which shall promptly enter an appropriate order.

(d) This court shall direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(Renumbered September 1984; amended September 22, 1988, effective September 22, 1988; further amended February 7, 1992, effective February 7, 1992.)

2.18. (Deleted)

(Deleted February 7, 1992.)

2.19. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated.

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, this court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of this court. A copy of such order shall be served upon such attorney, his or her guardian, and/or the director of the institution to which he or she has been committed in such manner as this court may direct.

(b) Whenever the Board shall petition this court to determine whether an attorney is incapacitated from continuing the practice of law by reason of physical or mental infirmity or illness or because of the use of drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as this court shall designate. If, upon due consideration of the

matter, this court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status on the ground of such disability for an indefinite period and until the further order of this court. Any pending disciplinary proceeding against an attorney shall be held in abeyance.

This court shall provide for such notice to the respondent attorney of proceedings in the manner as it deems proper and advisable and shall appoint an attorney to represent the respondent if he or she is without adequate representation.

(c) If, during the court of a disciplinary proceeding, the respondent contends that he or she is suffering from a disability by reason of mental or physical infirmity or illness, or because of the use of drugs or intoxicants, which makes it impossible for the respondent to defend himself or herself adequately, this court thereupon shall enter an order immediately transferring the respondent to inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (b) above.

If this court shall determine that the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) The Board shall cause a notice of transfer to inactive status to be published in a newspaper of general

circulation in the judicial circuit in which the disabled attorney maintained his or her practice.

(e) The board shall promptly transmit a certified copy of the order of transfer to inactive status to all judges of the State of Hawaii and shall request such action under the provisions of Rule 2.20 as may be indicated in order to protect the interests of the disabled attorney and his or her client.

(f) No attorney transferred to inactive status under the provisions of this rule may resume active status until reinstated by order of this court. Any attorney transferred to inactive status under the provisions of this rule shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as this court may direct in the order transferring the respondent to inactive status or any modification thereof. Such application shall be granted by this court upon a showing that the attorney's disability has been removed and he or she is fit to resume the practice of law. Upon such application, this court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as this court shall designate. In its discretion, this court may direct that the expense of such an examination shall be paid by the attorney.

Where an attorney has been transferred to inactive status by an order in accordance with the provisions of (a) above, and, thereafter, in proceedings duly taken, he or she has been judicially declared to be competent, this court may dispense with further evidence that his or her

disability has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(g) The filing of an application for reinstatement to active status by an attorney transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of his or her disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since his or her transfer to inactive status and he or she shall furnish to this court written consent to each to divulge such information and records as requested by court-appointed medical experts.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.20. Trustee Proceedings.

(a) Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, or has been suspended or disbarred and has not complied with Rule 2.16, and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, this Court, upon proper proof of the fact, shall appoint an attorney as trustee to inventory the files of the inactive, disappeared, deceased, suspended or disbarred attorney and to take such action as seems indicated to protect the interests of that attorney's clients.

(b) Any attorney so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates, except as necessary to carry out this court's order appointing the attorney to make such inventory.

(Renumbered September 1984; amended May 7, 1990, effective May 7, 1990.)

2.21. Administration and Finances. All matters relating to the administration and finances of the Board, including the annual budget provided for in Rule 2.4(e)(7), shall be subject to review by the Board of Directors and ultimate review and approval by the Court.

(Renumbered September 1984; amended October 27, 1989, effective November 1, 1989, subject to transitional orders.)

2.22. Confidentiality.

(a) General Rule. The files, records and proceedings of the Board, the hearing committees and Counsel, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of an attorney, shall be deemed confidential and shall not be disclosed except under the following circumstances:

(1) As between Counsel, the committees, the Board and the court in the furtherance of their duties;

(2) As between the Board, Counsel and an attorney admission or disciplinary authority, or judicial selection or disciplinary authority, of any jurisdiction in which the

attorney affected is admitted to practice or seeks to practice;

(3) Upon the request of the attorney affected;

(4) Where permitted by this court;

(5) Where required or permitted by these rules;

(6) Where the investigation is predicated upon a conviction of the respondent for a crime;

(7) Where this court enters an order transferring the respondent to inactive status pursuant to Rule 2.19.

(b) The Chairperson of the Board, upon the receipt of trustworthy evidence, may authorize Counsel to disclose an attorney's possible substance abuse, physical or mental illness, or other infirmity to the Director of the Attorneys and Judges Assistance Program.

(c) An affidavit consenting to disbarment submitted pursuant to Rule 2.14 shall be submitted to the hearing committee, to the Board and to this court at any time that the disbarred attorney applies for reinstatement. Such affidavit shall also be supplied to an attorney admission or disciplinary authority or judicial selection authority of any jurisdiction in which the attorney affected is admitted to practice or seeks to practice.

(d) In any case in which the subject matter becomes public through independent sources or through a waiver of confidentiality by the respondent, the Board may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing

without prejudgment, and to state that the respondent denies the allegations. The statement shall be first submitted to the respondent involved for his or her comments and criticisms prior to its release, but the Board in its discretion may release the statement as originally prepared.

(e) Except as ordered by this court, or as otherwise provided by these rules, the files, records and proceedings filed with this court by the Board, by Counsel or by a respondent, as well as any oral argument held before the court in connection with any disciplinary proceedings, are not confidential. However, where the Board has concluded that the sole discipline should be a public or private reprimand by the Board, and where the respondent has declined to consent to such discipline, the proceedings shall remain confidential pending review by the supreme court, unless and until the court imposes public discipline or the Board imposes public discipline pursuant to a remand by the court. Similarly where the sole discipline recommended by the Board is public censure by the supreme court, the proceedings shall remain confidential unless and until the court imposes public discipline.

(f) In addition, the Board shall transmit notice of all public discipline imposed by this court, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

(Renumbered September 1984; amended November 23, 1987, effective November 23, 1987; further amended November 8, 1991, effective November 8, 1991; further amended February 7, 1992, effective February 7, 1992.)

2.23. Interim Suspension.

(a) If at any time during the pendency of an investigation or a disciplinary proceeding, it appears that the continuation of an attorney's authority to practice law is causing or is likely to cause serious harm to the public, Counsel may request the Chairperson of the Board to appoint three Board members to serve on a committee whose function will be as follows:

(1) The committee will issue an Order to Show Cause to the respondent directing him or her to appear before the committee within five days of the service of the Order to Show Cause upon the respondent. At the hearing on the Order to Show Cause, Counsel shall present evidence and/or witnesses to the committee to substantiate his or her allegations that the respondent's continued privilege of practicing law during the pendency of the disciplinary proceedings is causing or is likely to cause serious harm to the public. The respondent shall have the right to appear at the hearing and to present evidence and/or witnesses opposed to the Order to Show Cause.

(2) After conducting the hearing, if the committee concludes that respondent's authority to practice law during the pending disciplinary proceedings is causing or is likely to cause serious harm to the public, the committee shall enter its findings and direct Counsel to file a petition with this court requesting that respondent's license to practice law be immediately suspended pending the outcome of the disciplinary proceedings.

(3) Upon the filing of such a petition with this court, this court shall immediately enter an order directing the respondent attorney to show cause why he or she should not be placed on an interim suspension. If no good cause is shown, the court shall enter an order of interim suspension which shall remain in full force and effect until further order of the court.

(b) An order imposing an interim suspension on an attorney under this rule shall not constitute a suspension of the attorney for the purposes of Rule 2.16 unless this court shall otherwise order.

(Renumbered September 1984; amended February 7, 1992, effective February 7, 1992.)

2.24. Audit of Trust Accounts.

(a) When Audit May be Ordered. Upon occurrence of any of the following, the Chairperson may order an audit of any trust accounts maintained by an attorney:

(1) Failure to file the trust account verification required under authority of Disciplinary Rule (DR) 9-102(B)(3) of the Code of Professional Responsibility;

(2) A trust account check is returned for insufficient funds or for uncollected funds, and cannot be satisfactorily explained;

(3) A petition for creditor relief is filed on behalf of an attorney;

(4) Felony charges are filed against an attorney;

(5) An attorney is alleged to be incapacitated under Rule 2.19 of these rules, or has been judicially declared to

be incompetent or has been involuntarily committed on the grounds of incompetency or disability;

(6) A claim against the attorney is filed with the Lawyers' Fund for Client Protection;

(7) Upon court order; or

(8) When requested for other good and sufficient reasons by Counsel, a hearing committee or the Board.

(b) Random Audits. The Board may randomly order audits of trust accounts.

(c) Examination of Other Financial Accounts. Nothing in this rule shall preclude the examination of the other financial accounts of an attorney if the examination of the attorney's trust accounts reveals to the satisfaction of the Chairperson that the attorney is not in substantial compliance with trust accounting requirements.

(d) Cost of Audit. Audits conducted in any of the circumstances enumerated in paragraph (a) or (b) above shall be at the cost of the attorney audited only when the audit reveals that the attorney was not in substantial compliance with the trust accounting requirements. It shall be the obligation of any attorney who is being audited to produce all records and papers concerning property and funds held in trust and to provide such explanations as may be required for the audit.

(Added September 22, 1988, effective September 22, 1988; amended February 7, 1992, effective February 7, 1992.)

2.25. (Deleted)

2.26. Effective Date. These rules shall become effective on July 1, 1974, and any disciplinary investigation pending on that date shall be transferred to the Board, provided that any case then pending with respect to which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these rules.

(Renumbered September 1984; further renumbered September 22, 1988.)

Rule 13. PROCEEDINGS FOLLOWING FINAL ADJUDICATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES.

Whenever the conviction of a criminal defendant has been overturned and a new trial ordered because of a finding that the defendant had ineffective assistance of counsel in the proceedings against him or her, and the order has become final, either because it was not appealed, or because it has been finally affirmed on appeal, it shall be the duty of the prosecutor and the counsel for the individual defendant each within five days of the finality of such order to file a certificate in the title of the cause with the Supreme Court of Hawaii noting that such an order has been entered and attaching a copy of that order to the certificate.

Within five days of the first receipt of such a certificate by the supreme court, the chief justice shall appoint a special master to determine whether action against the counsel alleged to have been incompetent is warranted.

Within five days from his appointment, the special master shall mail a notice of his appointment together with a copy of the order of his appointment, the certificate or certificates, and the order reversing the conviction to the respondent attorney at his last known address as shown in the records of the clerk of the Supreme Court of Hawaii.

Within 45 days from mailing, the respondent attorney shall file with the clerk of the supreme court an answer showing cause why corrective action as provided herein should not be taken by the supreme court. If the respondent attorney wishes to disqualify the special master, he

shall file with his return a motion therefor supported by an affidavit made upon personal knowledge and showing facts sufficient to establish the personal bias and prejudice of the special master toward him.

If a motion for disqualification is filed, the master shall rule on the same within five days from the date of filing. That ruling shall be appealable only after an order in the proceedings as hereinbelow set forth has been entered.

The master shall within five days after receipt of the answer of the respondent appoint an attorney to further prosecute the proceedings and shall give notice of the appointment to the respondent attorney in the same manner as provided above.

The respondent attorney may represent himself or may designate an attorney to represent him. The respondent or his attorney and the attorney appointed by the master shall have 45 days from the appointment of the attorney by the master to conduct any discovery proceedings in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. On the expiration of the 45 days, the master shall set the matter for hearing within 30 days, take such evidence in accordance with the Hawaii Rules of Evidence as may be proffered by the parties, and within 10 days of the conclusion of the hearing, render a decision and an order either dismissing the proceedings or recommending corrective action against the respondent attorney.

Corrective action which may be recommended by the master and/or adjudicated by the supreme court may consist of any one or more of the following:

(1) Requiring the respondent attorney to take a prescribed course or courses of remedial education and to produce satisfactory evidence of his or her passing such courses;

(2) Suspending the respondent's license to practice law until (1) has been complied with;

(3) In cases where the master finds that ineffective assistance of counsel may have resulted from a violation of DR-6-101 or DR-7-101, the master shall, in addition to (1) and (2), refer the matter to the Office of Disciplinary Counsel for investigation under Rule 2 of these rules. In the event of a reference under this subparagraph, the master's finding and the reference shall be deemed confidential and shall not be disclosed except pursuant to the provisions of Rule 2.22 of these rules.

Within 20 days from the rendering of the master's decision and proposed order, respondent or his attorney and the attorney appointed by the master to prosecute the proceedings may file exceptions with the Supreme Court of Hawaii supported by a memorandum in support thereof.

Within 40 days of the rendering of the decision and proposed order by the master, the supreme court shall enter an order either dismissing the proceedings or ordering corrective action in accordance with the guidelines set forth above.

(Added July 15, 1985, effective July 15, 1985.)

PARTINGTON AND FOLEY
ATTORNEYS AT LAW

2450 PACIFIC TOWER, 1001 BISHOP STREET
HONOLULU, HAWAII 96813-3608

EARLE A. PARTINGTON
DANIEL R. FOLEY

TELEPHONE: (808) 526-9500
FAX: (808) 545-2435

OF COUNSEL
YVES-LOUIS SAGE
B.P. 20238
PAPEETE, TAHITI
Licensed to practice in France and its overseas territories

June 9, 1992

University of Hawaii Foundation
2444 Dole Street, Bachman 101
Honolulu, Hawaii 96822

Dear Sir/Madam:

I understand that the dean of the William S. Richardson School of Law has a fund available to him entitled the "Dean's Discretionary Fund," which fund is used by the dean for special projects for the law school. I am writing to determine if you are able to answer the following questions:

1. What is the history of the Dean's Discretionary Fund?

2. Who holds legal title to this fund?

3. Who has the power to spend the money in this fund?

4. Is this fund governed by H.R.S. § 304-8 or any other statute regulating public monies?

5. If this fund is not considered to be state money, is it held by the University of Hawaii Foundation, which I believe is a private entity?

6. If this fund is not considered to be state money, are state or public funds ever commingled in it?

7. Who maintains the accounts for this fund, and where can one obtain records of those accounts?

8. Is there any accounting made to any public entity for this fund?

9. If legal title to this fund is held by a private entity, is there any way that the monies in this fund can be claimed to be public funds?

I have been informed that the Dean's Discretionary Fund is owned by the University of Hawaii Foundation which, as I understand it, is an entirely private body with no connection to any state agency. I hope that you will be able to help me. If you have any questions about this letter, please feel free to telephone me.

Sincerely,

/s/ Earle A. Partington
Earle A. Partington

EAP/csl

SEAL
UNIVERSITY OF HAWAII FOUNDATION
Bachman Hall 101
2444 Dole Street
Honolulu, Hawaii 96822
Phone: (808) 956-8849

June 16, 1992

Mr. Earle A. Partington
Partington and Foley
Attorneys at Law
2450 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813-3608

Dear Mr. Partington:

I am responding to your letter of June 9 concerning the "Dean's Discretionary Fund" at the William S. Richardson School of Law.

The proper title of the fund is "Law School Annual Fund." This fund is similar to others established for the support of individual colleges, schools, and other campuses of the University of Hawaii. The exact title varies from unit to unit, some called "Enrichment," some called "Advancement," some called "Discretionary," and some called "Annual Fund." In all cases, the purpose of the fund is to encourage gifts for the broad, general support of that particular unit, with the precise use of the funds for the benefit of that unit depending upon the needs and priorities at that point in time.

The source of the funds, including those in Law, are private gifts of alumni, friends, corporations, and other

private organizations. No public funds are involved, nor can any of these funds be claimed to be public.

These gifts are received, recorded, invested and managed by the University of Hawaii Foundation for the benefit of the program intended by the donor. The University of Hawaii Foundation, a private, not-for-profit corporation and a recognized 501(c)(3) charity files annual reports and returns with appropriate Federal and State agencies. The Foundation also publishes an Annual Report which is widely distributed. In the case of the Law School, as with several other schools, the Dean also issues an annual report which summarizes the uses of funds given in support of the school. However, funds given to and managed by the UH Foundation are not "public" monies, nor are they subject to public regulation any more than are the gifts given to any other recognized charitable organization.

Finally, authority to spend the gifts given explicitly to the Law School Annual Fund is vested in the Dean, in consultation with faculty and staff as he wishes. However, all requests to expend funds from accounts held by the Foundation are reviewed to ensure that their expenditure is consistent not only with the needs of the academic unit as determined by the appropriate personnel there, but also consistent with any restrictions placed on the gifts by the donor or donors. Obviously, with a fund set up to provide broad, general support for a school or college there are virtually no programmatic restrictions other than that the funds be used for the benefit of that school and not some other unit of the University. By contrast, the Foundation through its review would ensure that funds given to the Law School's Scholarship Fund

would be expended only for scholarships and not for any other purposes within the school.

I hope this is responsive to your inquiry.

Sincerely,
/s/ Edwin Penn
Edwin Penn
Executive Vice President

cc: Dean Jeremy Harrison

EP:wka